No._____

Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1993

HOUSE OF RAEFORD, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, CLC,
Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does Section 8(a)(1) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(a)(1), proscribe acts which merely provide an employer with the opportunity to engage in coercive conduct when it is conceded that the employer did not, in fact, threaten, coerce, or intimidate employees?

2. Does an employer violate Section 8(a)(1) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(a)(1), as a result of its supply clerk recording for inventory purposes the names of employees who voluntarily request that they be provided pro-company t-shirts when there is no evidence that any employee was threat-

ened, coerced, or encouraged to request or wear a pro-company t-shirt?

3. Must a supervisor specifically advise employees that she is stating her personal opinion in order for that opinion to be protected by § 8(c) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(c)?

4. Does an employer violate Section 8(a)(1) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(a)(1), when a low level supervisor states a personal opinion that she is afraid that she (the supervisor), as well as other employees, might be out of a job if the Union is voted in?

Parties to the Proceeding

The parties before this Court are those set forth in the caption.[1]

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[1] Petitioner has no parent company or nonwholly owned subsidiary company.

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No. 93 -

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

HOUSE OF RAEFORD FARMS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

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UNITED FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION, AFL-CIO, CLC,
Intervenor.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
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REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS BELOW

The National Labor Relations Board issued its order on August 31, 1992. Said order is reported at 308 NLRB 568 (1992). (A copy is reproduced in the appendix to this petition at page 44). The United States Court of Appeals for the Fourth Circuit issued its decision on September 20, 1993. Said decision was unpublished but carries the case numbers 92-2114 and 92-2216. (A copy is reproduced in the appendix to this petition at page 4). The opinion was amended on October 6, 1993. (A copy is reproduced in the appendix to this petition at page 3). Petitioner's timely petition for rehearing was denied on October

18, 1993. (A copy is reproduced in the appendix to this petition at page 1).

STATEMENT OF JURISDICTION

The judgment of the court of appeals sought to be reviewed was entered on September 20, 1993. A timely petition for rehearing was filed on October 1, 1993. On October 6, 1993, the court of appeals amended its opinion. On October 18, 1993, the court of appeals denied the petition for rehearing. This Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 7 of the National Labor Relations Act, as amended, 29 U.S.C. § 157, provides:

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8(a)(1) of National Labor Relations Act, as amended, 29 U.S.C. § 158(a)(1), provides:

(a) It shall be an unfair labor practice for an employer -

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

Section 8(c) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(c), provides:

> (c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

Section 9(a) of the National Labor Relations Act, as amended, 29 U.S.C. § 159(a), provides:

> (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for

> the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

STATEMENT OF CASE

A. Statement of Proceedings Below

On August 15, 1988, the United Food and Commercial Workers Union (Union) filed a representation petition with the National Labor Relations Board (NLRB or Board) requesting that it be designated as the exclusive

bargaining representative for production and maintenance employees employed by House of Raeford Farms, Inc. (Company or Raeford) at its Raeford, North Carolina facility. As a result of this petition, the Board conducted a secret ballot election on October 7, 1988. In this election, employees rejected the Union by a vote of 420 to 391 with 29 challenged ballots. (Appendix -p. 18).

Subsequent to the election, the Union filed objections alleging that the Company had interfered with the election. It also filed unfair labor practice charges against the Company. As a result of these charges and objections, the Regional Director for Region Eleven of the NLRB issued a Consolidated Complaint, as amended,

alleging that the company unlawfully discharged two employees in violation of Section 8(a)(1) of the Act; that it unlawfully discharged seven employees in violation of Sections 8(a)(1) and 8(a)(3) of the Act; that it unlawfully refused to rehire one employee in violation of Section 8(a)(4) of the Act; and that it had committed various independent violations of Section 8(a)(1) of the Act. (Appendix - pp. 83-86).

The NLRB acquired jurisdiction under Sections 10(a) and (b) of the Act, 29 U.S.C. §§ 160(a) and 160(b). Pursuant to Section 10(c) of the Act, 29 U.S.C. § 160(c), a hearing was held before Administrative Law Judge Bruce C. Nasdor (ALJ), beginning on June 20,

1989 and concluding on February 14, 1990.

The ALJ issued his decision on June 12, 1991. He found that the allegations that the Company had engaged in conduct violative of Sections 8(a)(1), (3), and (4) of the Act were not supported by credible evidence and recommended that the Complaint and Objections be dismissed in their entirety. (Appendix - pp. 314-315).

The Board's General Counsel and the Union filed exceptions to the ALJ's Decision on August 13, 1991 and August 14, 1991, respectively. On August 31, 1992, the Board issued its Decision, Order, and Direction of Second Election. With three specific exceptions, the Board adopted the ALJ's decision as its own.

Specifically, the Board deviated from the ALJ's decision on the following issues, finding that:

(1) The Company's solicitation of employee grievances, its promise to remedy those grievances, and its actual grant of new benefits, during the organizational campaign, violated Section 8(a)(1) of the Act. (Appendix - pp. 47-62).

(2) The Company's recording of the names of employees who received "vote-no" t-shirts reasonably tended to interfere with the employee's free choice of a bargaining representative and therefore violated Section 8(a)(1) of

the Act. (Appendix - pp. 62-66).

(3) The Company violated Section 8(a)(1) of the Act, and interfered with employee free choice in the election, by Supervisor Annie Gilchrist's conversations with employees in which she stated that she was afraid that she, as well as other employees, would be out of a job if the employees selected the Union as their bargaining representative. (Appendix - pp. 67-70).

On September 5, 1992, the Company timely filed its petition for review of the Board's decision with the United States Court of Appeals for the

Fourth Circuit. On October 2, 1992, the Board filed a cross application for enforcement of its order. The court of appeals acquired jurisdiction pursuant to Sections 10(e) and 10(f) of the Act, 29 U.S.C. §§ 160(e) and 160(f). Those applicable provisions specify no time in which a party must seek review of a Board order.

On September 20, 1993, the panel of the court of appeals unanimously refused to enforce that part of the Board's decision finding that the Company had violated § 8(a)(1) by soliciting and promising to correct grievances after a mass walkout of employees. (Appendix - pp. 11-20). A majority of the panel, however, enforced the two portions of the Board's order finding that the Company violat-

ed § 8(a)(1) by recording the names of employees who requested pro-company t-shirts and by the statements of a low level supervisor that she was afraid that she, as well as other employees, might be out of a job if the Union was voted in. (Appendix - pp. 20-33). Judge Wilkinson dissented from this portion of the decision and stated that he could find no violations of the Act by the Company. (Appendix - pp. 33-43).

B. Relevant Facts

The Company operates a turkey processing plant in Raeford, North Carolina where it employs approximately 1000 employees. Although numerous allegations of unlawful conduct by the Company during the course of the union

campaign were made, only two remain at this time.

The ALJ's findings of fact regarding the distribution of t-shirts was not reversed by either the Board or the court of appeals. These findings were as follows:

> [Food Service and Deli Sales Manager] Brenda Branch testified that she ordered approximately 1,000 "vote no" tee shirts and gave them to Beatrice McCrae, the supply room clerk to distribute to employees.
>
> McCrae testified that as part of her normal duties she keeps all supplies which are distributed to the employees. She requires them to sign for any of such supplies in order to keep track of the inventory, and at the end of the year she throws away the list.
>
> Therefore, McCrae, as is consistent with her normal procedure, required the employees who asked for teeshirts to sign a list. Management gave her no instruc-

tions to keep such a list. There is no evidence that management was even aware of the list. According to the testimony of McCrae, two employees, Monroe and Ware saw the list because they helped pass out the shirts.

McCrae decided not to give "vote no" tee-shirts to employees who were wearing pro-union tee-shirts. Therefore, several employees were denied shirts. Branch testified she was unaware of this until she received complaints from several employees. Thereupon, she called McCrae and asked why she was not giving tee-shirts to these employees. McCrae responded that she didn't feel that someone who was wearing a union tee-shirt should get a "vote no" shirt. Branch informed Johnson [Company President] of the situation and he agreed with McCrae that the employees had to be one way or the other.

There is no evidence that the list was utilized for polling purposes. The employees with pro-union shirts were literally showing their sentiments on their chest. The list was

> simply for the purpose of keeping track of inventory. No employees were coerced or pressured into wearing the "vote no" shirts. Accordingly, I recommend that this allegation in paragraph 9(s) of the complaint be dismissed.

(Appendix - pp. 300-303).

The ALJ's findings of fact regarding the statements made by supervisor Annie Gilchrist were not reversed by either the Board or the court of appeals. These findings were as follows:

> Gilchrist testified that she had one on one conversations about the Union with approximately eight to ten employees including those named above. She testified further that she said the same thing to each of them. Gilchrist related that she said "I'm not asking you how you plan to vote." She then told the employees "I need my job and if the Union come, we both might be out of a job." When she was asked how long

> these conversations lasted, she testified "it wasn't even a minute, ---." The transcript should be corrected at page 1345 to correct the word "was" to "wasn't." The witness testified using the word "wasn't."
>
> I have no doubt that Gilchrist was expressing her personal opinion. It is also noted that Gilchrist, in her testimony used the word "might," and I credit her. There is no evidence that Gilchrist [sic] remarks were communicated by employees to other employees. The conversation occurred in the work area, not in an office. Moreover, Gilchrist did not represent that she was speaking on behalf of Respondent. I recommend dismissal of the allegation relating to Gilchrist in paragraph 9(j) of the complaint.

(Appendix - pp. 288-289).

REASONS FOR GRANTING THE WRIT

This case presents two important issues of federal labor law which have

not been, but should be, settled by this Court. The decision of the panel majority of the court of appeals, over the dissent of Judge Wilkinson, has sanctioned the Board's unprecedented efforts to expand the scope of Section 8(a)(1) of the Act and limit the scope of Section 8(c) of the Act.

More specifically, the Board, with the approval of the panel majority, has expanded Section 8(a)(1) of the Act to proscribe conduct which is neither threatening, intimidating, nor coercive, but which merely creates an "opportunity", never acted upon, to engage in threatening, intimidating, or coercive conduct.

The panel majority of the court of appeals has also erroneously sanctioned the NLRB's condemnation of pure

statements of opinion which are explicitly protected by § 8(c) of the Act simply because the supervisor did not specifically state that she was giving a personal opinion.

A. The Board, With The Approval of The Panel Majority, Has Expanded Section 8(a)(1) To Prohibit The Mere Opportunity, Never Acted Upon, To Engage In Unlawful Conduct.

Paragraph 9(s) of the Fourth Consolidated Complaint alleged that the Company interfered with, restrained, and coerced its employees in the exercise of their section 7 rights in that it "[p]olled its employees by means of its distribution of "Vote No" T-shirts during September and the first week of October, 1988." The ALJ recommended dismissal of this allegation for the following reasons:

> There is no evidence that the list was utilized for polling purposes. The employees with pro-union shirts were literally showing their sentiments on their chest. The list was simply for the purpose of keeping track of inventory. No employees were coerced or pressured into wearing the "vote no" shirts. Accordingly, I recommend that this allegation in paragraph 9(s) of the Complaint be dismissed.

(Appendix - pp. 302-303).

The Board did not reverse the ALJ's findings of fact. Rather, it concluded that "Respondent's recording of names of those accepting the t-shirts reasonably tended to interfere with the employees' free choice of a collective-bargaining representative, and violated Section 8(a)(1) of the Act" because "[s]uch employer record-keeping of the employee's antiunion sentiments enables the Respondent to

discern the leanings of employees, and to direct pressure at particular employees in its campaign efforts." (Appendix - pp. 64-65).

The court of appeals panel, with Judge Wilkinson dissenting, affirmed this reasoning. According to the majority, "the employer's conduct interferes with an employee's exercise of his or her rights because the recording of the names provides the company with the opportunity to discern the leanings of its employees and to direct its energies toward or to pressure particular employees during a campaign." (Appendix - pp. 23-24).

As far as the Company is aware, this is the first time that the Board or a court has held that an employer commits an unfair labor practice mere-

ly because it had an opportunity to pressure or coerce employees. Such an interpretation of § 8(a)(1) represents an unwarranted expansion of the type of conduct that will violate the Act.

The mere existence of an "opportunity to discern the leanings of its employees and to direct its energies toward or to pressure particular employees during a campaign" (emphasis added) cannot conceivably create an unfair labor practice unless the employer acts on that opportunity by means of threats or promises. An employer has a specific right under § 8(c) of the Act to direct its energies toward persuading employees to support the Company, absent threats or promises. Thus, the Board has stated:

> It is conceded by everyone that Congress in-

> tended that both employers and unions should be free to attempt by speech or otherwise to influence and persuade employees in their ultimate choice, so long as the persuasion is not violative of the express provisions of the Act; and we find nothing in the statute which even hints at any Congressional intent to restrict an employer in the use of his premises for the purpose of airing his views.

Livingston Shirt Corp., 107 NLRB 400, 33 LRRM 1156, 1157-1158 (1953).

In Livingston Shirt the Board held that it was not an unfair labor practice for an employer to hold captive audience meetings with its employees for the purpose of making speeches and persuading employees to vote against the Union. Given that an employer may lawfully require its employees to sit and listen to the employer's campaign messages, it makes

no sense that an employer commits an unfair labor practice simply because it has the opportunity to direct campaign efforts at employees.

The Board does not contend that it is unlawful for an employer to make available campaign buttons, t-shirts, caps, or other paraphernalia. Indeed, both unions and companies frequently supply such items to their supporters. The Board has long held that such conduct is not unlawful unless accompanied by threats, promises, or pressure to accept or reject the items. E.g., Phillips Industries, Inc., 295 NLRB 717, 233, 133 LRRM 1122 (1989); Acute Systems, Ltd, 214 NLRB 879, 881-883, 88 LRRM 1531 (1974); Farah Manufacturing Co., 204 NLRB 173, 175-176, 83 LRRM 1361 (1973). In fact, the

Board jealously guards the right of employees to wear campaign insignia and an employer may not prohibit the wearing of such insignia absent "special circumstances." Republic Aviation Corp. v. NLRB, 324 U.S. 793, 65 S.Ct. 982, 89 L.Ed. 1372 (1945); Han-Dee Pak, Inc., 249 NLRB 725, 730 (1980).

Neither the Board nor the panel majority suggests that the Company actually used the inventory list to determine where it should direct its campaign efforts, much less that it made any threats or promises. The bottom line is that the Board has penalized Raeford not for its conduct, but for having the opportunity to engage in unlawful conduct. The Board's position in this case exceeds

its authority in determining unfair labor practices and should be reversed.

The only authorities cited by the Board for this overly expansive reading of § 8(a)(1) are the Board's prior decisions in Houston Chronicle Publishing Co., 293 NLRB 332 (1989) and Lott's Electric Co., 293 NLRB 297, 303-304 (1989), enfd. mem. 891 F.2d 601 (3rd Cir. 1989). The panel majority also cited National Gypsum Co., 280 NLRB 1003 (1986) as support for its position.

None of these cases support the finding of an unfair labor practice under Section 8 of the Act. First, neither Houston Chronicle nor National Gypsum Co. involved alleged unfair labor practices under Section 8 of the

Act. Rather, these cases were decided solely under the Board's authority under Section 9 of the Act to supervise free and fair elections.

There is a critical distinction between the Board's authority to prohibit unfair labor practices under Sections 8 and 10 of the Act and its authority to regulate representation elections under Section 9 of the Act. In order for conduct to violate the law and constitute an unfair labor practice under Section 8(a)(1), the conduct must "interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7." Section 7 of the Act guarantees employees the right to organize, to bargain collectively, to engage in concerted activities, and to refrain

from those activities. The Board's authority in adjudicating unfair labor practices is limited by the free speech provision of § 8(c) of the Act.

In supervising elections under Section 9 of the Act, the Board seeks to ensure a free and fair choice of representative. The standard for determining conduct which warrants setting aside an election is not the same as the standard for determining whether an unfair labor practice has been committed. General Shoe Corp., 77 NLRB 124, 21 LRRM 1337 (1948).

In this case, the only final order that is reviewable in the federal courts is the Board's order adjudicating unfair labor practices. Thus, even assuming, arguendo, that Houston Chronicle and National Gypsum are

sustainable under Section 9, they do not support the finding of an unfair labor practice under Section 8 in this case.

Moreover, neither Houston Chronicle nor National Gypsum is remotely similar factually to this case. In both Houston Chronicle and National Gypsum, the employer asked employees to participate in a contest to test their knowledge of the employer's campaign materials. The employees who wished to participate answered questions about the campaign and placed their names or social security numbers on the entry forms. The tests were graded and prizes in excess of $250 were awarded. The Board did not find that these contests were unfair labor practices under Section 8(a)(1), how-

ever, it did find that they constituted objectionable conduct warranting setting aside the elections. In reaching this conclusion, the Board relied both on the size of the prizes and that employees were required to identify themselves on their entry forms.

Unlike Houston Chronicle and National Gypsum, Raeford did not sponsor a contest, did not offer a prize of any type, and did not obtain answers to questions which allowed it to direct pressure at specific employees. The only information that Raeford obtained was the same information that employees were openly displaying by wearing the t-shirts. Houston Chronicle and National Gypsum are completely inapposite.

Although Lott's Electric Co., 293 NLRB 297, 303-304 (1989), enfd. mem. 891 F.2d 601 (3rd Cir. 1989), involved unfair labor practices, the facts of the case are totally inapposite. In that case, the employer's supervisor personally handed out "Vote No" buttons to employees. The Board found the action in Lott's unlawful based on the proposition that an employer's request during an election campaign that an employee wear pro-employer insignia constitutes interrogation because it forces the employee into an open declaration either for or against the union. That proposition is inapplicable here. Employees were not approached and asked to either accept or reject a t-shirt. In order to receive a t-shirt, the employee had to

go to the supply room and request one. No supervisor or manager ever coerced or pressured any employee into making such a decision.

In summary the Board's expansive interpretation of § 8(a)(1), which has been sanctioned by the panel majority, is fundamentally at odds with the statute itself, Congressional intent, and well-established case law interpreting the statute. It represents an attempt by the Board to expand its authority under Sections 8 and 10 of the Act to proscribe the mere opportunity to engage in threatening, coercive, or intimidating conduct. The Company requests that the Court grant certiorari in order to review this important issue of federal labor law.

B. The Board, With The Approval of The Panel Majority, Has Proscribed Pure Statements of Opinion In Violation of Section 8(c) of The Act.

The ALJ recommended dismissal of the allegations regarding Supervisor Annie Gilchrist. The ALJ explained:

> I have no doubt that Gilchrist was expressing her personal opinion. It is also noted that Gilchrist, in her testimony used the word "might," and I credit her. There is no evidence that Gilchrist [sic] remarks were communicated by employees to other employees. The conversation occurred in the work area, not in an office. Moreover, Gilchrist did not represent that she was speaking on behalf of Respondent. I recommend dismissal of the allegation relating to Gilchrist in paragraph 9(j) of the complaint.

(Appendix - p. 289).

The Board rejected this recommendation because Gilchrist did not specifically state that she was giving

her personal opinion (Appendix - p. 68). The Board, however, conceded that "a different inference might be drawn had Gilchrist's remarks been made in isolation" rather than in the context of other unfair labor practices (Appendix - p. 69). Over, the dissent of Judge Wilkinson, the panel majority enforced this unfair labor practice.

Section 8(c) of the Act specifically protects the "expressing of any views, argument, or opinion" so long as "such expression contains no threat of reprisal or force or promise of benefit." What the Board, with the approval of the panel majority, has done is engraft on § 8(c) the additional requirement that employees be

specifically advised that an opinion is being given.

There is nothing in the Act that requires an employer's agent to specifically advise employees that she is stating a personal opinion. Rather, the determination of whether a particular statement is a lawful opinion or an unlawful threat is one that must be made on the basis of the total context and circumstances. Here, the ALJ who heard the testimony concluded that Gilchrist's statement was a lawful statement of opinion. The Board's rejection of this recommendation, which is based solely on the fact that Gilchrist did not state that she was giving a personal opinion, is artificial and undercuts the First Amendment protection provided by § 8(c).

Judge Wilkinson, in his dissent, recognized that the failure to use the magic words, "this is my personal opinion" was not controlling:

> [Gilchrist] spoke of her fear that "we both might be out of a job" thereby indicating that she spoke as a fellow employee rather than as a company supervisor. In addition, she made clear that her concern stemmed from her personal need for employment, not from her professional concern for the welfare of the company. In the words of the ALJ, "I have no doubt that Gilchrist was expressing her personal opinion."

The Board's conclusion in this case is contrary to its prior findings in Standard Products Co., 281 NLRB 141 (1986), modified on other grounds, 824 F.2d 291 (4th Cir. 1987). In that case, the Board upheld the administrative law judge's conclusion that statements made by a supervisor in

circumstances strikingly similar to those in the present case did not violate Section 8(a)(1) of the Act. In Standard Products Co., a supervisor told an employee that her

> personal opinion was that she was against the Union, because she was afraid that if the Union came in, the plant would close down, and she needed her job.

281 NLRB at 151.

The only distinction between Standard Products and this case is that Gilchrist did not specifically advise employees that she was stating a personal opinion. As noted earlier, this does not warrant finding an unfair labor practice when it is clear from the surrounding circumstances, as here, that employees understood that a personal opinion was being given.

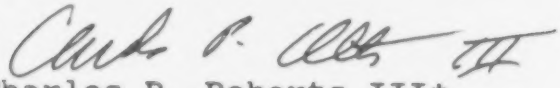
In summary, the Board, with the approval of the panel majority, has substantially reduced the First Amendment right codified in § 8(c) of the Act by requiring that employees be specifically advised that a personal opinion is being stated. The Company requests that this Court grant certiorari in order to review this important issue of federal labor law.

CONCLUSION

For the reasons stated above, the petition for certiorari should be granted.

Dated: Greensboro, North Carolina
January ____, 1994

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Charles P. Roberts III, do hereby certify that I have this day caused to be filed via Lawyers Printing Co., Inc. with the Clerk's Office of the United States the foregoing Petition For Writ of Certiorari To The United States Court of Appeals For the Fourth Circuit and further certify that copies have been served upon the following person(s), by placing a copy of the same in certified mail, postage prepaid, return receipt requested, properly addressed thereto:

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Dated this the 14th day of January 1994.

HAYNSWORTH, BALDWIN,
JOHNSON AND GREAVES, P.A.

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No. (2)

Supreme Court, U.S.
FILED

JAN 14 1994

OFFICE OF THE CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 1993

HOUSE OF RAEFORD, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, CLC,
Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Filed
October 18, 1993

No. 92-2114
11-CA-12943

House of Raeford Farms, Inc.
Petitioner,

v.

National Labor Relations Board
Respondent,

Local Union 204, United Food and Commercial Workers
Intervenor.

No. 92-2216
11-CA-12943

National Labor Relations Board
Petitioner,

v.

House of Raeford Farms, Inc.
Respondent.

On Petition for Rehearing with Suggestion for Rehearing In Banc

House of Raeford Farms, Incorporated filed a petition for rehearing

with suggestion for rehearing in banc.

Judge Wilkinson voted to grant panel rehearing. Chief Judge Ervin and Judge Murnaghan voted to deny.

No member of the Court requested a poll on the suggestion for rehearing in banc.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Murnaghan, with the concurrence of Chief Judge Ervin and Judge Wilkinson.

For the Court,

/s/ Bert M. Montague

CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Filed
October 6, 1993

No. 92-2114 (L)
11-CA-12943

House of Raeford Farms, Inc.
Petitioner,

v.

National Labor Relations Board
Respondent,

ORDER

The Court amends its opinion filed September 20, 1993, as follows:

On page 11, first paragraph, line 6 -- the end of the sentence is corrected to read "that the order of the NLRB with respect to the latter two claimed § 8(a)(1) violations be enforced."

For the Court - By Direction

/s/ Bert M. Montague

Clerk

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 92-2114

House of Raeford Farms, Inc.
Petitioner,

v.

National Labor Relations Board
Respondent,

Local Union 204, United Food and Commercial Workers
Intervenor.

No. 92-2216

National Labor Relations Board
Petitioner,

v.

House of Raeford Farms, Inc.
Respondent.

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.

(11-CA-12943)

Argued: June 10, 1993

Decided: September 20, 1993

Before ERVIN, Chief Judge, and MURNAGHAN and Wilkinson, Circuit Judges.

Order enforced by unpublished per curiam opinion. Judge wilkinson wrote a dissenting opinion.

COUNSEL

ARGUED: Charles P. Roberts, III, HAYNSWORTH, BALDWIN, JOHNSON & GREAVES, P.A., Greensboro, North Carolina, for Petitioner, Joseph A. Oertel, Senior Litigation Attorney, NATIONAL LABOR RELATIONS BOARD, Washington, D.C., for Respondent.

ON BRIEF: Jerry M. Hunter, General Counsel, Yvonne T. Dixon, Acting Deputy General Counsel, Nicholas E.

Karatinos, Acting Associate General Counsel, Aileen A. Armstrong, Deputy Associate General Counsel, NATIONAL LABOR RELATIONS BOARD, Washington, D.C., for Respondent.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

A union, the United Food and Commercial Workers Union, Local 204 ("the Union"), and a company, House of Raeford Farms, Inc. ("the Company"), as is not uncommon, waged a struggle over whether the Union, in a properly conducted election, might become the representative of the Company's em-

ployees. The Company won the election, and not surprisingly the Union charged numerous violations of the National Labor Relations Act, 29 U.S.C. § 151 *et seq*. The administrative law judge ("ALJ") found, as to every charge, in favor of the Company. The National Labor Relations Board ("the NLRB") affirmed as to all but three of the charges. As to them, it reversed, deciding in the Union's favor. Violations by the Company of § 8(a)(1) of the Act, 29 U.S.C. § 158-(a)(1)[1], were found (1) by soliciting, promising to address, and remedying

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[1] Section 8(a)(1) protects employees by making it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise" of their rights, under § 7 of the Act, 29 U:S.C. § 157, to organize, join, form, or assist labor organizations.

employee grievances during the Union campaign, (2) by permitting only those employees who did not wear "Union Yes" t-shirts to receive a Company-supplied "vote no" t-shirt and by recording the names of employees who accepted "vote-no" t-shirts, and, finally, (3) by threatening employees with plant closure if the Union won the election.

The Company has contended on appeal that it had legitimate business reasons for soliciting and remedying grievances during the Union campaign and that there was no coercion or intimidation associated with the distribution of the Company-supplied "vote-no" t-shirts. In addition, the Company has contended that the statements of its supervisor were not threats of plant closure but rather

were mere expressions of personal opinion. The NLRB has cross-petitioned for enforcement of the order.

Our standard of review is one of deference. The NLRB's findings and conclusion that the Company violated § 8(a)(1) must not be disturbed if supported by substantial evidence taken from the record as a whole. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951). "If the findings of the Board have substantial support in the record as a whole, our inquiry ends and its order must be enforced even though we might have reached a different result had we heard the evidence in the first instance." *NLRB v. Daniel Construction Co.*, 731 F.2d 191, 193 (4th Cir. 1984); *see also Universal Camera*, 340 U.S. at 488

(noting that "the Board's choice between two fairly conflicting views" should stand even if the court finds that it would have justifiably drawn a different conclusion).[2]

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[2] The only dispute in the instant appeal concerns the proper inference (*i.e.*, lawful conduct or unlawful conduct) to be drawn from the evidence. The parties, for example, do not appear to dispute issues of material fact. Furthermore, the NLRB did not overturn the ALJ's credibility determinations. The NLRB, however, did draw different conclusions from the ALJ's findings of underlying fact. Therefore we are not placed in the position of evaluating the ability of the NLRB versus the ability of the ALJ to judge the veracity of various witnesses and to make findings of fact. In short, the NLRB is not precluded from drawing inferences or legal conclusions that are contrary to those of the ALJ. Accordingly, the substantial evidence standard of review should remain the same for the purposes of the appeal. *See, e.g., American Thread Co. v. NLRB,* 631 F.2d 316, 320 (4th Cir. 1980) ("[The] standard of review is not altered because the Board drew different inferences and legal conclusions from the evidence than did the ALJ.... The Board, not

The Company operates a turkey processing plant and employs approximately 1000 people. In the spring of 1988, Marvin Johnson, owner and president of the Company, became concerned about employee dissatisfaction. The annual employee turnover rate stood at the time at roughly 250%, and the Company was plagued by high absenteeism. On May 15, 1988, Johnson hired Eric Wowra to take the position of Personnel Director. Wowra was instructed to explore the reasons for and to suggest solutions to the

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the ALJ, is ultimately vested with the responsibility for determining whether an unfair labor practice has been committed."); *see also NLRB v. Frigid Storage, Inc.*, 934 F.2d 506, 509 (4th Cir. 1991) (stating the same and noting that "there is an important distinction between an ALJ's findings as to credibility of witnesses and those drawing inferences or applying applicable law.").

plant's problems. Johnson specifically expressed to Wowra his concerns regarding the absenteeism, the high rates of turnover, plant safety, the size of work crews, and the high number of employees seeking to borrow money.

Almost immediately Wowra began meeting daily with the employees on the plant floor and discussing with them their concerns and perceptions of the plant's problems. Wowra also spoke with a consultant regarding employee retirement plans. A suggestion box also was instituted by the then new General Manager Lou Lucente. On July 19, Wowra, Manager Lucente, and Quality Control Manager Don Brewer conducted an employee meeting at which plant problems were discussed and

employee grievances solicited. Attendance was voluntary. According to Wowra's notes, the employees raised complaints about Saturday work, wages, the holiday pay policy, the health excuse policy, vacations, and the bathroom policy. The employees also criticized the behavior of their supervisors: they tore up doctors' notes excusing absences for illness, were insensitive to employee problems, made sexist remarks, and so forth.

Sometime in July, Wowra completed "Challenge 1988-1989," a document detailing his suggestions for improving the situation at the plant. The document outlined the basic goals of his proposed program, including reducing plant crewing, improving productivity, reducing processing costs,

improving management/supervisory effectiveness, instituting a management/supervisory incentive program, increasing salaries, and improving employee morale. In light of these goals, Wowra suggested that the Company institute a safety program, recognize long-term employees, restart the monthly newspaper, institute a pension plan, increase employee training, upgrade plant appearance, initiate an employee-of-the-month program, study the advisability of a day care program, and hold management picnics.

On July 26, Wowra submitted his proposals to Johnson. The two men discussed the topics set forth in the document. When asked by Johnson about the value of continuing the employee meetings, Wowra replied that he was

"not real sure about the value of those meetings" and would "get back to him on that." The men also discussed the possibility of a credit union. To that point, the Union had in no way appeared.

Two days later, on July 28, four employees walked off their jobs. They complained essentially that they were overworked and underpaid. Wowra told the four employees to take the rest of the day off and to return to work the next morning.

The four employees did return the next day. On Monday, August 1, however, several hundred of the Company's 1,000 employees walked out. Questioned by Wowra about their concerns, the employees explained that they wanted a pay raise and improved bene-

fits. They further complained about Saturday work. When Johnson appeared and spoke to the crowd, he announced that he would look into their complaints about Saturday work and other benefits and further declared that all would receive a raise on Labor Day.

On the same day, during the walkout, an employee began handing out authorization cards for the national Maritime Union. Wowra noted the distribution of union authorization cards among the crowd. On Tuesday, August 2, the Union (*i.e.*, the United Food and Commercial Workers Union) also began an organizational campaign.[3] At the same time, the majority of striking employees still refused to return

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[3] The National Maritime Union eventually withdrew from the campaign.

to work, and production at the plant was cut significantly. On August 3, Wowra informed the employees that the plant would not operate that Saturday. He further stated that Johnson would stand behind the promises he had made on the first day of the walkout. Ultimately, from Wednesday, August 3, through Friday, August 5, the majority of employees returned to work. Meanwhile, the union organizing continued.

The Company returned to full production on August 8. The following day, Johnson, assisted by Wowra, began holding a series of employee meetings "to find out what the problem was." Johnson described the meetings as "strictly for what's bothering you, what can we do to make it better." The meetings were small-ten to fifteen

employees attended each session. Over a period of eight days, the company held at least 33 meetings. The Union was not discussed at the meetings; however, during the sessions, Johnson promised to and ultimately did remedy some of the grievances that had been raised during the past several weeks.

The Union filed a representation petition on August 15, 1988. The election was held on October 7. The tally showed 420 votes were cast against the Union, and 391 were cast for the Union, with 29 challenged ballots. The Union timely filed objections to conduct affecting the election outcome and also filed unfair labor practice charges against the Company. The objections were consolidated into one complaint.

It is evident that only when the Union became involved could the possibility of § 8(a)(1) violations arise from the Company's employee meetings and consideration of grievances. Yet the significant Company attempts to secure employee satisfaction already had begun taking place before the Union entered the picture. *See NLRB v. Appletree Chevrolet, Inc.*, 608 F.2d 988, 999 (4th Cir. 1979) (stating that the promise of benefits during a union campaign is lawful if consistent with company practice or was planned and settled upon prior to the union campaign). The Company's remarks during and following the walkout as well as the 33 meetings with employees--which began before the Union filed its representation petition--simply did no

more than finalize what already had been explored and discussed as part of an on-going legitimate business plan to improve conditions at the plant. Furthermore, a Company is not prohibited from reacting to a mass walkout and from taking legitimate steps to prevent future demonstrations. While the evidence shows that meetings occurred and grievances were solicited, the record when viewed as a whole does not suffice to spell out a § 8(a)(1) violation.

II.

During the Union organizing campaign, supply room clerk Beatrice McCrae was given by the Company 1,000 "vote-no" t-shirts to distribute to employees. McCrae routinely required employees to sign a list when they

removed supplies from the supply room, and she continued that practice when she distributed the t-shirts. There is no evidence in the record that McCrae was told by management to deviate from her usual routine. In addition, McCrae also denied t-shirts to employees who were wearing pro-Union clothes. In response, several employees complained to a Company supervisor. Unaware of McCrae's decision to limit distribution in such a manner, Johnson was informed by the supervisor of McCrae's method. However, he allowed McCrae to continue refusing t-shirts to those employees wearing prounion attire and commented that the employees had "to be one way or the other."

The question on appeal is the correct inference as to whether the Company's manner of issuing t-shirts amounted to a § 8(a)(1) violation. The NLRB, possessed of large discretion, was justified in deciding that the evidence supported a finding that the Company's "method of distribution" of the "vote-no" t-shirts tended to interfere with the employees' free choice during an election.

The distribution by an employer of antiunion material does not violate the Act unless it is accompanied by some form of coercion or pressure. The NLRB has ruled, for example, that directly asking an employee during a Union election to wear some article expressing antiunion sentiment constitutes a form of interrogation because,

under those circumstances, the employee is forced into an open declaration either for or against the Union. *See, e.g., Lott's Elec. Co.*, 293 NLRB 297 (1989), *enf'd.*, 891 F.2d 281 (3d Cir. 1989) (supervisor handed out "vote-no" buttons, and such conduct constituted interrogation because it forced the employees into an open declaration either for or against the Union).

The Company here did no such asking. However, the NLRB has further held that if an employer records the names of employees in a context in which it could gain an understanding of the employee's knowledge of or sympathies for pro or antiunion activities, the employer has violated the Act. Under those circumstances, the employer's conduct interferes with an

employee's exercise of his or her rights because the recording of the names provides the company with the opportunity to discern the leanings of its employees and to direct its energies toward or to pressure particular employees during a campaign. *See, e.g., Houston Chronicle Publishing Co.*, 293 NLRB 332 (1989) (recording names in an employer-sponsored raffle); *National Gypsum Co.*, 280 NLRB 1003 (1986) (employees required to identify themselves on entry forms for an employer-sponsored raffle).

There is no question that the Company clearly could distribute "vote-no" t-shirts to gain support for its side during the Union campaign and to "combat" the "vote yes" t-shirts. The question, however, is whether its

chosen method of distribution-including the refusal to provide t-shirts to those employees wearing prounion attire and the requirement of signing McCrae's list upon receipt of a t-shirt-amounted to conduct that reasonably could be coercive or infringing to employees. "In evaluating an employer's conduct under section 8(a)(1), 'the test is not whether the language or acts *were coercive in actual fact,* but whether the conduct in question had a *reasonable tendency* in the totality of the circumstances to intimidate.'" *NLRB v. Nueva Eng'g, Inc.*, 761 F.2d 961, 965 (4th Cir. 1985) (emphasis added) (quoting *Corrie Corp. v. NLRB,* 375 F.2d 149, 153 (4th Cir. 1967)).

In light of the circumstances in the instant case, the conclusion of the NLRB that the method of t-shirt distribution had a reasonable tendency to intimidate or coerce is a reasonable one. As noted, supply room clerk McCrae refused, on her own accord, to give the t-shirt to any employee wearing prounion attire. As a consequence, prounion employees became more identifiable. Furthermore, the employees were in fact bothered by the distribution, for they complained to a supervisor about McCrae's practice of selectively dispensing t-shirts. When informed of McCrae's decision, the Company did not abrogate the practice but instead commented with approval. McCrae also required-as she did for all supplies taken from her supply

room-the employees to sign her supply room list acknowledging receipt of the "vote-no" t-shirt. Possible identification of pro-union employees was therefore increased. In short, the t-shirts were not distributed in a readily apparent free and random manner. As the NLRB commented, by distributing the t-shirts and taking down names, McCrae was "cloaked in the apparent authority of the Respondent as its special agent, much as employees who solicit authorization cards are deemed special agents of the Union."

Under the circumstances, the method of distribution reasonably could have been coercive and infringing to employees, and the NLRB's finding of unlawful conduct must be sustained.

III.

Finally, the day before the election, Annie Gilchrist, a supervisor in the cutup and packing department, talked about the Union with approximately eight to ten different employees. The ALJ and the NLRB both credited Gilchrist's testimony that she said in each conversation: "I'm not asking you how you plan to vote. I need my job and if the Union come, we both might be out of a job." The one-on-one conversations apparently lasted approximately one minute, and there was no evidence that the employees communicated Gilchrist's comments to any other employees.

"It is well established that an employer violates section 8(a)(1) of the Act if it threatens to close the

plant or institute layoffs if its employees select union representation." *Nueva*, 761 F.2d at 966. Section 8(c), 29 U.S.C. § 158(c), however, makes it clear that the expression of an opinion does not constitute an unfair labor practice if the expression contains "no threat of reprisal or force or promise of benefit."

Accordingly, Gilchrist's statements, as statements of a Company supervisor, presented two alternative choices, and the NLRB did not fail to make a supportable choice. The question is whether the statements had a "reasonable tendency" under the circumstances to intimidate. Gilchrist did not explicitly state that she was giving her personal opinion or voicing her own fears. Rather, the day before

the election, she relayed only the statement that "she was not asking how you plan to vote" *but* "we might both be out of a job" if the Union won the election. Clearly, the remarks conveyed the specter of layoffs in the event of a Union win. Moreover, Gilchrist did not "soften" the notion of job losses by any mention that she was giving merely her personal opinion. Although the conversations did not occur in an intimidating office setting, they did nevertheless take place during work hours in the work area, not, for example, in a social setting or during a lunch break. In short, it is not patently clear that Gilchrist was conveying merely her personal opinion. It seems an equally reasonable and fair conclusion of the NLRB

that employees, often intimidated by or even respectful of supervisors, could interpret Gilchrist's remarks as the comments of a Company official, as opposed to the opinion of a concerned coworker. *Cf. NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969) (noting that an inquiry into the effect of employer statements must "take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear").

Gilchrist's statements, made not to one, or two, but to numerous employees, near the culmination of a hotly contested election could have

proceeded from a purely private personal opinion, but the NLRB was not precluded from ascribing the remarks to the Company. As the French say: "I'm not asking" could be a case of "qui s'excuse, s'accuse." Gilchrist was a departmental supervisor and thus could be allied with management. Under the circumstances, the finding of a § 8(a)(1) violation was properly within the powers of the NLRB.

In summary, of the three § 8(a)(1) violations determined by the NLRB to have existed, one (soliciting and remedying grievances following a walk-out but during a union campaign) we find to be unjustified. However, the other two (the "vote-no" t-shirt distribution and supervisor Gilchrist's statements expressing uneasi-

ness about plant closure if the Union won the election) we conclude were within the authority of the NLRB to be decided as they were. Consequently, we order that the order of the NLRB be enforced.

ORDER ENFORCED

WILKINSON, Circuit Judge, dissenting:

I cannot join the majority's enforcement of the Board's order in this case. The first ground asserted by the NLRB effectively punishes the House of Raeford for nothing more than trying to keep its business afloat in the face of a massive employee walk-out. The additional grounds offered by the Board in support of its decision appear almost in the nature of an afterthought - indeed, the Board ap-

pears to conceded as much with respect to the third asserted basis for enforcement. The ALJ rejected both these grounds for finding an § 8(a)(1) violation, and I believe them to be without substantial evidence.

I commend the majority for not enforcing the order on the basis of the Board's first finding that Raeford's remedying of employee grievances during the course of an election campaign was an unfair labor practice. Raeford had experienced a massive employee walkout, a situation that makes turkey processing very difficult. Management knew that it had labor problems even before this walkout, as evidenced by Marvin Johnson's hiring of Eric Wowra as personnel director and Wowra's meetings with

employees in an effort to trace the sources of their dissatisfaction. The walkout confirmed for Johnson and Wowra that they must address those problems or risk another walkout that could do in Raeford's business.

To be sure, an employer cannot improve working conditions if the timing is calculated to discourage union activity or restrict employees' choices. *J.P. Stevens & Co. v. NLRB*, 668 F.2d 767, 770 (4th Cir.), *vacated on other grounds*, 458 U.S. 1118 (1982). On this record, however, the Board has not shown that Raeford conferred benefits on its employees with the primary "purpose of inducing employees tc vote against the union." *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). The Board asserts

that it may presume that the benefits were offered to sabotage the union, but any such presumption has surely been rebutted here. Raeford was responding to the walkout's significant disruption of its business, just as the union responded to the walkout by initiating an organization campaign. As the ALJ found, the walkout "was certainly a graphic illustration that the employees were dissatisfied and had problems. [Raeford] was more than justified in finding out what those problems were and curing them." To handcuff Raeford from addressing its employee relations problems in these circumstances would transform the labor laws into a suicide pact; if Raeford loses all its employees and is forced to shut down, there will be

little union organizing to do. The Board's decision puts the cart before the horse - instead of seeing the labor laws as a means of securing good employer-employee relations, it bars the company from improving employee relations because such a course may impeded unionization. This makes little sense to me.

The second basis for the Board's finding of an § 8(a)(1) violation - Raeford's distribution of "vote-no" t-shirts - is equally puzzling. It is well established that an employer's distribution of antiunion material is unlawful only if the employer coerces employees into receiving such material. *See, e.g., William T. Burnett & Co., Inc.*, 273 NLRB 1084, 1093 (1984). In making the requisite "coercion"

finding, the Board is unable to point to any evidence that the employees were coerced by the employer's t-shirt offer. As the record makes clear, the employees were free to request t-shirts or not, and management did not attempt to force the shirts upon any employee. Faced with this lack of evidence of coercion, the Board instead asserts that it is entitled to presume coercion from (1) supply room clerk Beatrice McCrae's keeping of a list of those who requested and received t-shirts, and (2) McCrae's refusal to give t-shirts to those wearing pro-union paraphernalia.

This goes too far. Ms. McCrae's keeping of the list hardly qualifies as coercion because the list-keeping was a standard practice used to keep

track of inventory in the supply room. The ALJ found, and the Board does not dispute, that Ms. McCrae kept lists for all supplies, and that the employees knew about her record keeping practice. Given the ALJ's findings that "[m]anagement gave her no instructions to keep such a list" and that "[t]here is no evidence that management was even aware of the list[,]" it is unreasonable to assume that Raeford used the list for polling, rather than inventory, purposes.

Ms. McCrae's decision not to give t-shirts to employees wearing prounion shirts is also an insubstantial basis for a finding of coercion. The majority finds this "selective[] dispensing" of t-shirts to be objectionable because it caused "prounion em-

ployees [to become] more identifiable." Majority Op. at 12. However, as the ALJ noted, "[t]he employees with pro-union shirts were literally showing their sentiments on their chest" and had already publicly declared their position. It is unreasonable to assume that Ms. McCrae's practice would somehow influence the employees' decisions regarding the t-shirts and, ultimately, the election.

Finally, the Board supports its third finding with illogical presumptions rather than with substantial evidence. The Board asserts that Ms. Gilchrist's statement - "I need my job and if the Union come, we both might be out of a job" - constituted an unlawful threat to close the plan or to institute layoffs. This finding is

flatly contrary to the Board's earlier decision in *Standard Products Co., Rocky Mount Civ.*, 281 NLRB 141 (1986), *modified on other grounds,* 824 F.2d 291 (4th Cir. 1987). In *Standard Products,* the Board upheld as lawful strikingly similar statements made by a supervisor to an employee. The Board seeks to justify its inconsistent treatment of the two cases by emphasizing that the supervisor in *Standard Products* explicitly stated that it was "her personal opinion" that "if the Union came in, the plant would close down, and she needed her job." 281 NLRB at 151. Because Ms. Gilchrist failed to utter the magic words, "this is my personal opinion," the Board assumes that she was speaking in her capacity as a supervisor.

This assumption goes against both the evidentiary record and common sense. She spoke of her fear that "we both might be out of a job," thereby indicating that she spoke as a fellow employee rather than as a company supervisor. In addition, she made clear that her concern stemmed from her personal need for employment, not from her professional concern for the welfare of the company. In the words of the ALJ, "I have no doubt that Gilchrist was expressing her personal opinion."

In sum, the Board's findings were based on flawed presumptions rather than substantial evidence. The majority has allowed deference to Board findings to gut the requirement that the Board provide substantial evidence

on the record as a whole. To the extent the Board's order rests upon findings that this company violated the National Labor Relations Act, I would deny its enforcement.

308 NLRB No. 83

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR

RELATIONS BOARD

HOUSE OF RAEFORD FARMS, INC.

and

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL NO. 204, AFFILIATED WITH UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL--CIO, CLC

Cases 11-CA-12943
11-CA-12987
11-CA-13081
11-CA-13121
11-CA-13369-2[1]
11-RC-5522

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

On June 12, 1991, Administrative Law Judge Bruce C. Nasdor issued the attached decision. The General Counsel and the Charging Party filed ex-

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[1] The complaint was amended at trial to include Case 11-CA-13369-2.

ceptions and supporting briefs. The Respondent filed a brief in answer to the General Counsel's and the Charging Party's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] only to

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[2] The General Counsel and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The General Counsel additionally contends in her exceptions that the judge was biased against the General Counsel's position and witnesses. We have carefully reviewed the record and find no merit in the General Counsel's allegation of bias.

In addition, the Respondent has filed a motion to strike portions of the exceptions and supporting briefs filed by the General Counsel and the Charging Party for failing to comply with the Board's Rules and Regulations, Sec. 102.46. We deny the motion to strike.

[3] In dismissing the complaint allegations that the Respondent discharged employees in violation of Sec. 8(1)(3) of the Act, the judge concluded that the Respondent, as to each of the allegations, met its burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 99 (1982). We note the judge's inadvertent failure to find preliminarily that the General Counsel established a prima facie case with regard to those allegations. Assuming that the General Counsel established a prima facie case, we agree with the judge's findings that in each instance the Respondent established that even in the absence of the employee's union activity it would have taken the same action.

In adopting the judge's finding that the Respondent did not violate

the extent consistent with this Decision and Order.

1. The judge dismissed the complaint allegations that the Respondent violated Section 8(a)(1) of the Act by soliciting employee grievances and promising to resolve those grievances in order to disccurage union activity. The judge found that although the Respondent conceded that it solicited grievances during the election campaign, pledged to correct

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the Act in discharging employees Michael Blackmon and Jessie Battle, we find it unnecessary to adopt his characterization of their inquiry into unemployment compensation as a "personal matter." Nor do we adopt the judge's findings that employee Alfreda Hammond is "inclined towards violence" and that Larry Jones was not considered to be an above average employee. We additionally note that the judge inadvertently misspelled the name of counsel for the General Counsel, Patricia L. Timmins.

them, and in fact made good on some of its pledges, the Respondent's conduct was nevertheless lawful because it had embarked on a program of analyzing and rectifying employee problems 2 1/2 months before the onset of union organizing activity. We do not agree.

In the spring of 1988,[4] the Respondent's president, Marvin Johnson, hired Eric Wowra as personnel director of the Respondent, a turkey processing plant. Johnson related to Wowra his concerns regarding high rates of turnover and absenteeism, plant safety, plant crewing, and the large number of employees requesting to borrow money. Johnson directed Wowra to bring any

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[4] All dates are in 1988, unless otherwise noted.

suggestions he had to Johnson's attention.

Thereafter, Wowra spent June and July walking the plant floor and talking to employees, and met with a consultant regarding a retirement plan for the Respondent's employees. In addition, on July 19 Wowra attended a meeting of employees arranged by the Respondent's general manager, Lou Lucente. The purpose of the meeting was to solicit employee grievances, and many complaints were raised concerning, interalia, wages, vacations, Saturday work, holiday pay practices, health excuse policy, and bathroom policy. Attendance was not required at this meeting; a handwritten note

was posted stating "we want volunteers for the meeting."[5]

On July 26, Wowra presented Johnson with a document entitled "Challenge 1988-89." Wowra testified that he "put in this booklet what I perceived what we needed to do as a management team to turn around our problems." On that date, Johnson and Wowra met and discussed various as-

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[5] Wowra testified that he was dissatisfied with the handwritten note, and after the July 19 meeting typed a form, submitted as R. Exh. 32, which stated that "[t]he next employee meeting will be held on Tuesday--July 26, 1988 . . .if you have not attended a previous meeting and wish to attend sign below." The July 26 meeting was never held.

The judge found that documentary evidence established that additional meetings were held in July other than on July 19. While additional meetings may have occurred, our review of the record indicates that the only meeting documented in the record was that attended by Wowra on July 19.

pects of the document. Johnson described the meeting as "just brainstorming" regarding the issues raised in the document. Wowra also told Johnson that he was not sure about the value of the employee meetings and would get back to Johnson on that.

On July 28, four employees walked off their jobs complaining that they were tired of working so hard and could not take it any more. On August 1, a mass walkout involving several hundred of the Respondent's approximately 1000 employees occurred. On that date, Johnson addressed the crowd of employees who had walked out. He told them that he was willing to listen to their complaints, promised them a raise on Labor Day, remarked that he would look into their complaints re-

garding other benefits and Saturday work, and urged the employees to go back to work. Wowra testified that he observed union authorization cards being distributed in the crowd on that date.

The employees did not return to work after Johnson spoke to them. The majority of employees did return to work by August 4, however. On that date, Wowra met with the Respondent's managerial and supervisory personnel to discuss the unionization campaign. The Respondent returned to full production on August 8. The Union filed a representation petition on August 15.[6]

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[6] The election was conducted on October 7. The tally of ballots showed 391 votes for the Union and 420 against, with 29 challenged ballots.

Commencing on August 9, Johnson and Wowra conducted a series of meetings with employees. Johnson described the meetings in the following manner:

> We started having meetings because somehow I had to find out what the problem was. The meetings[s] [were] strictly for what's bothering you, what can we do to make it better.

Wowra testified that he wanted the meetings small, preferably 10 to 15 employees. Wowra's notes of these meetings establish that at least 33 meetings were held over 8 working

days.[7] The Union was not discussed at these meetings.

Wowra's testimony establishes that Johnson specifically promised in the meetings to resolve employee grievances raised in these meetings regarding the policy of requiring the submission of a doctor's note when an employee was out sick, changing incentive pay from monthly to weekly, permitting the cafeteria and supply group employees to participate in the incentive pay program, fixing up the bathrooms and breakrooms, instituting

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[7] Submitted as R. Exh. 45, Wowra's notes establish that six meetings were held on August 9, six on August 10, six on August 11, three on August 15, three on August 16, six on August 18, one on August 19, and two on August 22. Wowra indicated that the meetings were intended to encompass the Respondent's entire work force of 1000 employees, and that there were approximately 50 meetings in all.

training sessions for supervisors, and fixing problems with timeclocks.[8] Johnson additionally explained to employees that "you tell me how many Saturdays you want to run and we'll see what we can do."

The judge correctly observed that am employer who has had a past practice and policy of soliciting employee grievances may continue to do so during an organizational campaign. See, e.g., *Lasco Industries,* 217 NLRB 527, 531 (1975). It is well established, however, that an employer cannot rely

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[8] For example, Wowra testified as follows regarding the Respondent's policy requiring a doctor's note if an employee was out sick:

> They just really didn't like being required to bring in the doctor's excuses and in one of the meetings Marvin just said, we're going to do away with that. He just made a decision right in the meeting.

on past practice to justify solicitation of employee grievances if the employer significantly alters its past manner and methods of solicitation during the union campaign. *Carbonneau Industries,* 228 NLRB 597, 598 (1977). We find that the Respondent's method of solicitation of grievances following the onset of the union organizing campaign clearly constitutes a significant alteration of its past practice.

Prior to the organizing campaign, the Respondent held one documented employee meeting---and possibly several others at most---in which it solicited employee grievances. Further, the Respondent merely sought employee volunteers to attend these meetings. Indeed, Wowra remarked to Johnson several days before the employee walk-

out that he was not sure about the value of these meetings. Approximately 1 week after the walkout and after the Respondent had observed employees signing union authorization cards, however, the Respondent embarked on a series of systematic meetings among groups of its employees in which it solicited grievances. These meetings, of which at least 33 were documented and which were intended to encompass the Respondent's entire work force of 1000 employees, stand in stark contrast to the Respondent's prior policy of requesting volunteers to attend meetings that occurred, at best, infrequently. Accordingly, the Respondent clearly initiated only after the onset of the union organizing campaign a comprehensive, systematic policy of

grievance solicitation far exceeding the Respondent's prior conduct in this area.

Further, the Respondent explicitly promised to remedy numerous grievances in these meetings and, as the judge found, the Respondent did in fact make good on some of these promises. It is true, as the judge observed, that the Board has found that an employer's granting of new wages and benefits during the pendency of a representation election is lawful where such action had been decided upon prior to the onset of union activity. *See, e.g., Nissan Research & Development,* 296 NLRB 598, 611 (1989). There is nothing in the record here which establishes that the Respondent had decided, prior to the onset of

union activity, to change employee incentive pay from monthly to weekly, include cafeteria and supply group employees in the incentive program, change its policy requiring doctor's notes, and synchronize the timeclocks--all items that were specifically promised by the Respondent in its August grievance solicitation meetings, and at least some of which were thereafter implemented by the Respondent.[9] These items, for example, are

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[9] Wowra's testimony fully corroborates the judge's finding that the Respondent actually made good on some of its promises to remedy the employees' grievances. Regarding the employees' request to change the Respondent's incentive pay program from monthly to weekly, Wowra testified:

> [I]t made a lot of sense to everybody, it made a lot of sense to Marvin [Johnson] and he says, I'm changing it right now. It's now weekly. And he did change it to weekly, he said we're going to make it easier and the incentive

not even mentioned in the proposals submitted by Wowra to Johnson on July 26.

The judge found the Respondent's conduct to be lawful because Wowra had been hired prior to the onset of union activity for the purpose of analyzing and adjusting employee problems.

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pay is now weekly.

Wowra testified regarding the synchronization of timeclocks:

> Time clocks were a problem. They mentioned the time clocks. Employees said they were loosing [sic] their incentive pay because some of the time clocks weren't synchronized. Well, he [Respondent's president Johnson] directed me and directed Ray Hawkins at that time to make sure the time clocks were synchronized, to get with maintenance. As a matter of fact, the guards go around twice a day now and monitor the time clocks to see if they're properly in [sic] and that any time clock that's out of sync [sic] is immediately reported to the maintenance department and its [sic] repaired on the spot.

However, this was a general goal of the Respondent, and Wowra's proposals of July 26 were not a fixed plan that the Respondent had definitively decided to implement prior to the onset of union activity. The grant of benefits during a union campaign may be justified where they were actually decided on prior to the onset of union activity; such grants are not justified, as here, by prior general policy goals of the employer, however laudable. Accordingly, we find that the Respondent's solicitation of employee grievances, its promise to remedy those grievances, and its actual grant of new benefits--all during the organizational campaign--violate Section 8(a)(1) of the Act, and constitute objectionable conduct which interfered

with the free choice of employees[10] in the election.[11]

2. We further find, contrary to the judge, that the Respondent's

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[10] In finding this conduct to be objectionable, we note that many of the Respondent's grievance solicitation meetings took place after the critical period began on August 15.

[11] In light of these findings, we find it unnecessary to pass on whether the Respondent's grant of a 50-cents-across-the-board wage increase on Labor Day was unlawful, because such a finding would be cumulative.

We find, contrary to the judge, that *Daniel Construction Co.*, 264 NLRB 569, 615-616 (1982), enfd. 731 F.2d 191 (4th Cir. 1984), is inapposite to the instant situation. In that case, the employer specifically advised employees that "[w]e are here to listen to your grievances but not to give you anything." 264 NLRB at 616. We additionally find, contrary to the judge, that *Clark Equipment Co.*, 278 NLRB 498 (1986), is inapposite. In *Clark*, the Board found lawful the employer's literature distributed to employees which discussed improvements that -- unlike in this case-- the employer had actually begun prior to the union campaign. 278 NLRB at 500.

method of distribution to employees of "vote-no" T-shirts reasonably tended to interfere with their free choice of a bargaining representative, and violated Section 8(a)(1) of the Act. The Respondent ordered approximately 1000 vote-no T-shirts and gave them to the supply room clerk, Beatrice McCrae, to distribute to employees. McCrae required employees requesting T-shirts to sign a list, as she regularly does when any supplies are distributed. In addition, McCrae denied T-shirts to employees who were wearing prounion apparel. Respondent Official Branch received complaints regarding this practice from several employees, and informed Respondent President Johnson of the situation. Johnson approved of the practice and, as the judge found,

"agreed with McCrae that the employees had to be one way or the other." The judge concluded that the Respondent's distribution of T-shirts was lawful, noting that the list of employee names was kept for inventory rather than polling purposes, and finding a lack of coercion of employees to wear the vote-no T-shirts.

We find, however, that the Respondent's practice of recording the names of employees who accepted the antiunion apparel reasonably tended to interfere with employee free choice in the election. As noted, the Respondent did not simply provide a supply of T-shirts at a central location, unaccompanied by any coercive conduct. Rather, while the availability of the T-shirts purported to be on a volun-

tary basis, to receive the T-shirts, employees were required to refrain from displaying support for the Union and sign a list acknowledging receipt of the T-shirt. Such employer record-keeping of the employee's antiunion sentiments enables the Respondent to discern the leanings of employees, and to direct pressure at particular employees in its campaign efforts. Cf. *Houston Chronicle Publishing Co.*, 293 NLRB 332 (1989). Given the circumstances of this case, it would be reasonable for the employees to conclude that the recording of employees' names as they received the antiunion T-shirts was done for purposes other than merely monitoring supplies. We accordingly find that the Respondent's recording of names of those accepting

the T-shirts reasonably tended to interfere with the employees' free choice of a collective-bargaining representative, and violated Section 8(a)(1) of the Act. *Lott's Electric Co.*, 293 NLRB 297, 303-304 (1989), enfd. mem. 891 F.2d 601 (3d. Cir. 1989).[12]

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[12] The fact that the Respondent contends that it was unaware of the list does not change the result. The test in determining whether conduct is objectionable of violative of Sec. 8(a)(1) is an objective one. Thus, given the circumstances under which the T-shirts were distributed by the Respondent, it would have been reasonable for the employees to believe that their positions regarding the Union were being recorded for the Respondent's use.

Member Oviatt notes that, in distributing the T-shirts to employees and compiling the list of takers, supply room clerk McCrae was cloaked in the apparent authority of the Respondent as its special agent, much as employees who solicit authorization cards are deemed special agents of the Union for the limited purpose of assessing the coercive impact of statements they make while soliciting. See *Davlan Engineering*, 283 NLRB 803

3. We find contrary to the judge, that the Respondent violated Section 8(a)(1) of the Act, and interfered with employee free choice in the election, by Supervisor Annie Gilchrist's implicit threats that the plant would close if the employees selected the Union as their bargaining representative. Gilchrist, a supervisor in the Respondent's cutup and packing department, testified that she had one-on-one conversations with 8 to 10 employees. In each conversation, she stated, "I'm not asking you how you plan to vote," but continued, "I need my job and if the Union come, we both might be out of a job." The judge found these comments to be lawful because Gilchrist was expressing

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(1987).

her personal opinion, did not represent that she was speaking on behalf of the Respondent, there was no evidence that the remarks were communicated to other employees, and the conversations occurred in the work area rather than in an office. We disagree.

Gilchrist's remarks clearly conveyed to employees that they might be out of a job should the Union be voted in. Gilchrist, who initiated the conversations, did not even state that she was simply expressing her personal opinion. Accordingly, nothing occurred in these conversations to indicate to employees that Gilchrist was speaking in other than her capacity as a supervisor for the Respondent, particularly since the conversations

occurred in work areas.[13] Although a different inference might be drawn had Gilchrist's remarks been made in isolation, in the context of this heated antiunion campaign in which the Respondent has engaged in other unlawful and objectionable conduct any ambiguity as to the remarks' coercive implications must be resolved against the perpetrator. Even if the unlawful threats were not in fact communicated to additional employees, we find that such conversations with 8 to 10 employees cannot be dismissed as isolated or de minimis. In addition, we

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[13] Compare *Standard Products Co.*, 281 NLRB 141, 151 (1986), modified on other grounds 824 F.2d 291 (4th Cir. 1987), in which similar statements made on a single occasion were held to be lawful where the supervisor explicitly stated that she was expressing her personal opinion and the conversation was initiated by the employees.

note the closeness of the election in this case. Accordingly, we conclude that Gilchrist's threats of plant closure, which occurred during the critical period, were both unlawful and objectionable.

Having found various incidents of objectionable conduct, we shall set the election aside and direct a second election.

4. In light of our findings that the Respondent has engaged in the above-described objectionable conduct, we find it unnecessary to pass on exceptions to the judge's overruling Objection 6 concerning the Respondent's distribution of a pamphlet entitled "Diary of a Strike."

Conclusion of Law

1. The Respondent, House of Raeford, Farms, Inc., is now and at all times material has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Food and Commercial Workers Union, Local No. 204, affiliated with United Food and Commercial Workers International Union, AFL-CIO, CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. By soliciting employee grievances, promising to remedy those grievances, and granting new benefits during the union organizational campaign in order to discourage union activity, by recording the names of employees accepting vote-no T-shirts

and thereby pressuring employees to make an open acknowledgment concerning their campaign position, and by threatening employees with plant closure if the employees selected the Union as their bargaining representative, the Respondent has violated Section 8(a)(1) of the Act.

4. The conduct described above in paragraph 3 additionally constitutes objectionable conduct affecting the result of the representation election which was conducted on October 7, 1988.

5. By the conduct described above in paragraphs 3 and 4, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has violated Section 8(a)(1) of the Act, we shall order the Respondent to cease and desist from engaging in such conduct and to take certain affirmative action.[14] Having further found that the Respondent has engaged in objectionable conduct affecting the outcome of the representation election held on October 7, we shall direct a second election.

ORDER

The National Labor Relations Board orders that the Respondent, House of Raeford Farms, Inc., Raeford,

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[14] Nothing in this Decision and Order should be construed as directing the Respondent to withdraw any benefits granted to employees.

North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Soliciting employee grievances, promising to remedy those grievances, and granting new benefits during the Union's organizational campaign in order to discourage union activity.

(b) Recording the names of employees accepting vote-no T-shirts and thereby pressuring employees to make an open acknowledgment concerning their campaign position.

(c) Threatening employees with plant closure if the employees selected the Union as their bargaining representative.

(d) In any like or related manner interfering with, restraining, or

coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its facility in Raeford, North Carolina, copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and main-

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[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

tained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that Case 11-RC-5522 is severed from Cases 11-CA-12943, 11-CA-12987, 11-CA-13081, 11-CA-13121, and 11-CA-13369-2 and that Objections 1, 21, 22, and 23 to the conduct of the election filed in Case 11-RC-5522 are sustained and the election is set aside; and that Case

11-RC-5522 is remanded to the Regional Director for Region 11 for the purpose of conducting another election at such time as he deems the circumstances will permit the free choice of a bargaining agent.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were

ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their employee status during the eligibility period and their replacements. Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall

vote whether they desire to be represented for collective bargaining by United Food and Commercial Workers Union, Local No. 204, affiliated with the United Food and Commercial Workers International Union, AFL-CIO, CLC.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election shall have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the names and addresses of all the eligible voters must be filed by the Employer

with the Regional Director within 7 days from the date of the Notice of Second Election. The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election if proper objections are filed.

Dated, Washington, D.C. August 31, 1992

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James M. Stephens, Chairman

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Dennis M. Devaney, Member

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Clifford R. Oviatt, Jr. Member

NATIONAL LABOR RELATIONS BOARD

(Seal)

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the
United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice. Section 7 of the Act gives employees these rights:

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT solicit employee grievances, promise to remedy those grievances, and grant new benefits during the Union's organizational campaign in order to discourage union activity.

WE WILL NOT record the names of employees accepting our distribution of

vote-no T-shirts, thereby pressuring employees to make an open acknowledgment concerning their campaign position.

WE WILL NOT threaten employees with plant closure if they select the Union as their exclusive bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

HOUSE OF RAEFORD FARMS, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 251 North Main Street, Room 447, Winston-Salem, North Carolina 27101-3986, Telephone 919-631-3212.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
DIVISION OF JUDGES

HOUSE OF RAEFORD FARMS, INC.

and

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL NO. 204, AFFILIATED WITH UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL--CIO, CLC

Cases 11-CA-12943
11-CA-12987
11-CA-13081
11-CA-13121
11-RC-5522

Patricia Timmons, Esq., for the General Counsel.
Carol L. Clifford, Esq., for the Charging Party.
Charles Roberts, Esq., and
Rodolfo R. Agraz, Esq., for the Respondent.

DECISION

Statement of the Case

BRUCE C. NASDOR, Administrative Law Judge: These cases were heard on certain dates beginning on June 20, 1989, and ending on February 14, 1990,

in Raeford and Fayetteville, North Carolina. A Complaint and notice of hearing was issued in Case No. 11-CA-12943 on October 31, 1988,[1] an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing issued in cases Nos. 11-CA-12943 and 11-CA-12987 on November 28, 1988, and a Second Order Consolidating Cases, Consolidated Complaint and Notice Of Hearing issued in cases nos. 11-CA-12943, 11-CA-12987 and 11-CA-13081 on January 31, 1988. Thereafter, a report on Objections, Direction, and Order Consolidating Cases issued in cases nos. 11-RC-5522, 11-CA-12943, 11-CA-12987, and 11-CA-13081 on February 7, 1989. On February 28, 1989, a

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[1] All dates are 1988 unless otherwise indicated.

Fourth Order Consolidating Cases, and Consolidated Complaint and Notice of Hearing issued.

Issues

1. Whether the Respondent engaged in certain independent acts which were violative of Section 8(a)(1)?

2. Did Respondent violate Section 8(a)(1) by discharging employees Michael Blackmon and Jessie Battle?

3. Whether Respondent violated Sections 8(a)(1) and 8(a)(3) by discharging Michael Washington, Phillip Freeman, Heyward Davis, Alfreda Hammond, Larry Jones, Mae Helen Daniel, Ernestine Bethea.

4. Did Respondent violate Section 8(a)(4) of the Act by refusing to rehire Alfreda Hammond?

Are the objections[2] sufficient in fact and in law to set aside the election? At the conclusion of her case, Counsel for the General Counsel moved,[3] and was allowed, to delete from the pleadings the, 8(a)(3) allegations relating to Johnny Hatcher and Theodore Mills.

Also deleted were several independent allegations within the meaning of Section 8(a)(1) of the Act.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs, I make the following:

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[2] The objections track the unfair labor practices with one exception.

[3] Counsel for the General Counsel's and Charging Party's Counsel's motions to correct the transcript are granted.

Findings of Fact

I. Jurisdiction

Respondent is now, and has been at all times material herein, a North Carolina Corporation with a plant located at Raeford, North Carolina, where it is engaged in the processing and sale of turkey and chicken products. During the past 12 months, which period is representative of all times material herein, Respondent received at its Raeford, North Carolina, plant, goods and raw materials valued in excess of $50,000 directly from points outside the state of North Carolina. During the past 12 months, which period is representative of all times material herein, Respondent shipped from its Raeford, North Carolina, plant, products valued in excess

of $50,000 directly to points outside the state of North Carolina.

Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization

United Food and Commercial Workers Union, Local No. 204, affiliated with United Food and Commercial Workers International Union, AFL-CIO, CLC (hereafter referred to as the Union) is a labor organization with the meaning of Section 2(5) of the Act.

III. Alleged Unfair Practices

Respondent operates a turkey processing plant in Raeford, North Carolina. It is owned by E. Marvin

Johnson, who has acted as its president since 1962. The facility employs approximately 1000 employees. Prior to May 1988, Respondent had no personnel director, but on approximately May 15, Erick Wowra was hired as the personnel director.

Michael Blackmon, Jessie Battle and the Walkouts

Battle did not testify at the hearing. He worked at the Respondent's plant on two separate occasions, the most recent from June to August 12.

Michael Blackmon worked at the plant from June 1987, until August 12, 1988. Both Blackmon and Battle worked in the chilling department. Their supervisor was Athens Barnes, also known as "Sarge."

On July 28, Blackmon, Battle, Chester Fields and Phillip Freeman walked off their jobs in the chilling department. As they were leaving, Blackmon advised assistant supervisor, Don Leggett, that they were leaving because they couldn't take it anymore, and they were tired of working so hard. The four employees then gathered in the employee parking lot.

Respondent concedes that Blackmon and Battle were, by these acts, engaged in protected concerted activity.

Blackmon testified that shortly thereafter, Roscoe McCollum, plant superintendent, Erick Wowra, personnel director, and Sherwood Locklear, plant manager, went to the parking lot and met with the four employees. The employees told management that they

were quitting because they didn't want to work that hard anymore, they wanted more money and more employees, to help them out. Locklear took Blackmon aside and told him that he would make him a bird hanger if the employees went back to work. This change in job classification would result in more money for Blackmon. The employees were told that more help would be forthcoming, but that Marvin Johnson, president of Respondent, would have to determine the money issue.

During the conversation Blackmon stated that a rumor was going around that Johnson had referred to the employees as "black slaves." Wowra responded that this was not true and the he, Wowra, would not work for Johnson if that were Johnson's senti-

ments. Wowra further stated that another member of management had made the statement, but it was not Johnson. Although Wowra did not divulge to the employees who in fact made the statement, he testified that indeed the statement had been made in his presence by general manager Lou LuSente (transcript spelling). LuSente has since been fired.

Wowra told the four employees to take the rest of the day off and to come back the next morning.

That afternoon, between 2 and 2:30pm, Johnson called a meeting in his conference room. It was attended by Wowra and other management representatives. Wowra testified that Johnson wanted to know what was going on with the employees in the parking

lot. Wowra advised Johnson that they were complaining about wages and hours and they just walked out. Moreover, they were tired and they mentioned the remark actually made by Lou LuSente, but attributed to Johnson. Wowra told Johnson that he sent the employees home and told them to come back tomorrow. Johnson asked Wowra if he thought they should be fired. Thereafter a general discussion ensued, wherein Wowra advised Johnson that if one employee walks out they have considered that a quit or a resignation and the employee was "written up" accordingly. Furthermore, according to Wowra, he advised Johnson that he did not believe these people could be legally terminated because they had been engaging in protected activity.

Wowra further testified that he has managed plants, been involved in walkouts, and he has addressed crowds of a 1,000 who were threatening to walk out of a plant. Moreover, for approximately two years, he experienced dealing with the National Maritime Union and their representatives as well as the meat cutters and their representatives, so he, according to this testimony, was familiar with what could and could not be done, and what should and should not be done in a plant environment. Johnson thereafter made the decision not to fire the individuals who walked out.

Freeman essentially corroborated Blackmon's testimony. He and the others returned to work the next day. Freeman testified that on that weekend

he and Fields went to Virginia. When it came time for the return trip, Freeman could not find Fields and returned alone. On Monday morning, August 1, Freeman told Barnes what had happened and asked permission to leave to go back to Virginia to look for Fields. According to Freeman, Barnes was worried about Fields and told him to talk to McCollum. Freeman did this and was granted permission to leave work so that he might find Fields.

After the four employees who walked out returned to work, they were approached by other employees and discussed a general strike. McCollum had also told Blackmon that he had checked with Johnson, and Johnson refused to give the employees a raise. Blackmon advised McCollum that employ-

ees were discussing about going out on strike. According to Blackmon, McCollum decided that that might get Johnson's attention.

On Monday, August 1, at approximately 10:00am, a large group of the employees began walking out of the plant. Wowra observed this and called Johnson at his home. Johnson was not present so Wowra left a message. Johnson responded to Wowra's message about a half hour later, and told him to talk to the employees and find out what their problems were.

Wowra went outside and talked to the employees. He asked them what their problems were, and they responded that they wanted Saturdays off, a pay raise, and better benefits. Wowra advised them that Johnson would be

there later that morning and he would talk to them, he asked them to go back to work but they refused his request.

Johnson accompanied by Wowra, walked across the street and stood on a trash can to talk to the employees. They yelled that they wanted more money, better benefits and Saturdays off. Johnson told the employees they would get a raise on Labor Day and that he would look into Saturdays and other benefits. He asked the employees to return to work.

After the walk out on August 1, on that same day, Ernestine Bethea commenced to hand out union authorization cards for the National Maritime Union. Thereafter on Tuesday, the Union herein, began an organizational campaign.

Both unions filed representation petitions, however the National Maritime Union subsequently withdrew its petition.[4]

After a meeting with the employees outside of the plant on August 1, Johnson and Wowra decided to cut production in half and to sell off the live turkeys to Carolina Turkeys in Mount Olive, and Cutty Farms, in Marshville, North Carolina.

On the next morning, August 2, some employees returned to work but the majority remained in the parking lot. Early that morning, Locklear, McCollum and Wowra went out and tried

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[4] A representation election was conducted on October 7. The vote was 391 for the Union and 420 against the Union with 29 challenged ballots. The Union filed timely objections to the election.

to persuade the employees to return to work. McCollum told them that they had not been fired and asked them to return. At the time a union representative was passing out authorization cards among the employees. Wowra requested the representative not pass the cards out on company property.

The next morning, August 3, approximately 100 to 150 employees returned to work. Wowra met with some of them in small groups and gave them their time cards. He informed them that they had not been fired, the only thing they had lost is pay for time missed. Moreover, Wowra advised the employees that the plant would not operate that Saturday, and that Johnson would stand behind his promises. He also advised the employees that it

was Respondent's intention to put them back in their old jobs, but that some new employees had been hired and everyone would be placed by their supervisors.

The majority of the employees returned to work on Thursday morning, August 4. Wowra again told the employees that which he had informed them of the previous day. As a result of selling off half of the live turkeys, management decided to wait until August 8, to return to full production. Therefore some employees were not returned on Thursday, but Wowra took their names and phone numbers and told them that a decision would be made later in the week.

Wowra's testimony and documentary evidence (Wowra's memorandum) reflect

that he met with supervisors and managers at 2:30pm to discuss what should, and should not be done, in regard to the Union organizational campaign. He informed the management of what Johnson had promised the employees and what he, Wowra, had told the employees as they returned to work. He instructed the managers to treat the people with respect, avoid any discussion of the Union, (it is their business), and to try to put the employees back in their former jobs. He also stated that plant rules would not be changed.

On Friday, August 5, employees were continuing to return to work. Some additional employees[5] were offered work but they requested that

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[5] Including Blackmon and Battle.

they be allowed to wait until Monday. Personnel Manager Molene Russell gave them permission to stay out until Monday.

Blackmon and Respondent's witnesses are factually in accord regarding the events leading up to, and including the terminations of Blackmon and Battle.

On Friday, August 12, Blackmon and Battle received their paychecks for the previous week. They were disturbed that they had not been paid for August 4 and 5, after they had offered to return.

Blackmon and Battle asked Barnes if they could go to the personnel office about this matter. Barnes allowed them to leave. They proceeded to the personnel office and stated

that they wanted to go to unemployment to see about the two days for which they were not paid. Russell told them they would have to get permission from their supervisor.

At this point in time the employees break time had begun, and Blackmon and Battle approached Barnes who was sitting in his vehicle, and asked if they could go to the unemployment office to inquire about getting paid for the two days. Barnes gave them permission to leave. They drove to the Hoke County Office which is 1 to 1 and 1/2 miles from the plant. The employee at the unemployment office told them he did not have the proper paper work, and gave them some telephone numbers so that they could make inquiry.

Blackmon and Battle returned to the plant at approximately at 10:00am. Battle stayed in the car while Blackmon went in and talked to Barnes. He told Barnes that he needed to go to the Cumberland County Unemployment Office in Fayetteville. Barnes told him that he did not have the authority to let him go, and that he was working short handed because he had let some of the other employees leave and he did not have enough employees. Therefore, he could not let Blackmon and Battle leave. Blackmon responded that he had already gotten permission from Barnes and that he Blackmon, was already clocked out.

In support of its contention that the chilling department was working short handed, Respondent introduced

the timecards of the 28 employees in that department. Two of the employees had previously quit and did not work that week. Another employee reported in on that Friday, but left at 8:52am and didn't return until 12:57pm. Another employee did not report to work until 9:18am. One employee was absent all day. One employee did not report to work until approximately 12:45pm. Freeman, although assigned to the chilling department, was on light duty at that time because of a hand injury.

More specifically, Blackmon told Barnes that he was already punched out and that he had only come back to let them know where he was going. Barnes replied that he was working short and that Blackmon should talk to either

McCollum or supervisor Annie Gilchrist. Blackmon responded that Barnes had already given him permission and that he was leaving and would return after he was finished. At that point he walked out and left.

Blackmon admitted that he did not attempt to approach McCollum or his assistant, Gilchrist to get permission to leave. Rather, he and Battle drove to the Cumberland County Unemployment Office in Fayetteville. They were informed there that this was a matter for Respondent, in view of the fact that they still were employed by Respondent.

They returned to the plant arriving at 3:30pm. Blackmon testified that he and Battle were "hot" about the matter and spent two hours "cool-

ing off." When they arrived they discovered that their time cards were not in the rack. They asked Barnes about this he informed them that their time cards were in the personnel office. They went to the personnel office where they were told that their cards were in Plant Manager, Sherwood Locklear's office. They proceeded to Locklear's office where he asked them if Barnes had given them permission to leave. Blackmon responded that Barnes did not say yes or no. Locklear told them that he needed to think about the matter and they should get back to him the next day.

The next day, they met with Locklear, McCollum and Barnes. McCollum asked Barnes if he had given them permission to leave the plant. Barnes

stated he had told them they could not leave. Locklear stated that he was going to rely on what Barnes said. McCollum then told Blackmon and Battle that they were terminated.

Conclusion and Analysis

Counsel for the General Counsel contends that Blackmon and Battle were terminated because of their walk out on July 28, which is protected, concerted activity. Respondent conceded that they were engaged in such activity.

As an alternative theory Counsel for the General Counsel contends that they were terminated for going to the unemployment office, another protected act of concerted activity.

There is no evidence that these employees were fired because of the

walkout, the preponderance of the evidence points the other way. Respondent attempted to understand the problems and resolve the walkout.

Freeman and Blackmon both testified that no one from management ever said anything to them about the walkout. Counsel for the General Counsel failed to demonstrate any evidence of animus on the part of Respondent, directed to Blackmon or Battle.

In view of the fact that Respondent cut its production in half, it became necessary for Respondent to gear up gradually by bringing employees back as needed. The processing operations are interdependent. I do not infer that this was invidious. It was simply a necessary decision made in the normal course of business.

I am convinced by the preponderance of the evidence, that Respondent discharged Blackmon and Battle because they left the plant after Barnes told them emphatically that he needed them because he was working short handed. Moreover, Barnes told them that they would have to get permission from McCollum. They made no attempt to find either McCollum or his assistant Gilchrist.

Furthermore, they left the plant the first time during a break period. The second time they requested leave during working time. Management has a basic right to maintain discipline and production. Respondent operates a line type of processing business. It can't be expected to allow people to leave work when they feel like it,

either on personal business or otherwise. Blackmon and Battle weren't faced with any emergency. They left the plant without the required permission, on a strictly personal matter. There is no showing that time was of the essence.

Blackmon admitted that Barnes told him he was short handed, and the evidence bears out the fact that the department was in fact understaffed. He also admits that Barnes told them not to leave without permission from McCollum. Blackmon paid no heed to get such permission, didn't even make the effort.

There is no evidence of discrimination or disparate treatment. Moreover the plant rule states employees cannot leave their work stations with-

out permission. Here, in an act of insubordination, they disobeyed a reasonable direct order by a supervisor.

Nor can I find any disparity in the treatment of Freeman or Calvin Brown. I note that Freeman or Calvin Brown. I note that Freeman participated in the July 28, walk out, and Brown was also on the parking lot at that time.

Freeman, who had a hand injury, and was on light duty, was given permission to leave by Gilchrist. Freeman, Brown's brother, did not tell Brown that he (Brown) could not leave the plant. To the contrary, Brown testified that, "he (Freeman) said let's go I thought everything was squared away."

The matter was fully investigated by McCollum. He decided that Freeman, who had permission, should be retained. Furthermore Brown convinced McCollum that he mistakenly believed he was also granted permission. McCollum perceived the episode as a communication problem between the two brothers, therefor termination was not warranted. Battle did not testify, therefor his knowledge is unknown. Barnes and McCollum impressed me as credible witnesses. They appeared to be objective and explicit in their testimony. When they didn't know an answer to a question, they acknowledged it.

I conclude that Respondent terminated Blackmon and Battle for the reasons it has advanced, and not for

any protected concerted activity. Respondent has satisfied its *Wright Line*[6] burden and would have terminated Blackmon and Battle, notwithstanding their concerted activity. Accordingly, I recommend that the 8(a)(1) allegations as to Blackmon and Battle, be dismissed.

Michael Washington

Michael Washington worked for Respondent from January, 1988, until he was terminated on August 25. During most of his tenure he worked in the eviscerating department or hanging live turkeys.

Washington participated in the August 1, walkout, returning on August 4. During the walkout Washington had a conversation about raises with John-

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[6] 251 NLRB 1083

son while they were crossing the street. A photograph of the two of them crossing the street appeared in the local newspaper. Respondent was aware that Washington loudly encouraged the employees who appeared to be returning to work during the walkout. He loudly told them they should not return to work, rather to continue staying out so as to win their demands. Washington was questioned on direct examination about his union activity, and in response he testified that he participated in the walkout and had his picture in the newspaper. Washington testified that he wore a union sunvisor until a week before he was terminated.

Carl Lindsey, who had worked for Respondent for a short period, testi-

fied that Washington was one of 10 to 25 members on the Union committee. He also acknowledged that the committee did not make itself known to management.

On August 25, the day of his discharge, Washington worked hanging live turkeys. He finished for the day at about 4:30pm and proceeded to the bathroom to cleanup. On his way there, he saw employee Johnny Hatcher, who had worked during the walkout, hanging the live birds. Hatcher stopped Washington and asked him if he was still hanging live birds. Washington answered affirmatively. Hatcher then told him that he had found some gloves and a smock, that the live bird hangers use as uniforms, and asked Washington if he wanted them.

Washington stated that he did, and Hatcher gave him a blue paper bag containing gloves and uniforms. Washington testified that he thought they were hanging uniforms based on his conversation with Hatcher. He put the bag that Hatcher gave him into his own blue gym bag. Washington then left the plant, heading across the street toward the employee's parking lot. He saw his supervisor Marion Love, the supervisor of the hanging department and the two began talking. Washington showed Love the gloves and uniforms and told him that some guy from the chilling department had given to him. He did not at that time identify the individual who gave him the items. According to Washington, Love with a wave of his hand, called over Kathleen

Ferguson, an employee of 19 years, and talked to her. Love then went back into his office. At that point, Richard Ferguson, the husband of Kathleen Ferguson and Ralph Allen, a supervisor, came out of the Scale House and waved at Washington to go to the Scale House office which he did. When he entered he was questioned by Dick Locklear, a supervisor, in the presence of Allen and Ferguson. According to his testimony, Washington was asked by all three supervisors what he had in the bag. He replied that some guy had given him some uniforms and some gloves. Locklear asked to see them, and Washington took the gloves and uniforms out of the bag and they had various supervisors names on

them.[7] Locklear told Washington to take Allena nd Ferguson into the plant, to show them who gave him the gloves and uniforms.

Washington, Allen, and Ferguson went into the chilling department, but were unable to locate the employee who had given Washington the items. According to Washington, Allen told him not to worry about it, that they would come back the next day and find the employee. The three of them then returned to the Scale House. At that point in time, Locklear asked Washington how many uniforms he had. Washington replied that he had ten hanging suits and three smocks. He was asked by Locklear where he got so many uni-

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[7] Including the names of Allen and Ferguson.

forms. Washington responded that he had obtained the uniforms from various supervisors, including Sherwood Locklear and Alfred McNeil, and that he had received the smocks when he first began working in the eviscerating department. He stated furthermore, that the uniforms he was originally given were size 34 and were too small. Later, Sherwood Locklear gave him size 46 uniforms which fit perfectly. Dick Locklear told Washington to bring in the other uniforms the next morning.

Washington testified that different types of smocks are worn by employees and supervisors. Those worn by supervisors button down the front and have the supervisors name on them, while employee smocks are tied around the back of the employee. The hanging

suits are a jump suit that you have to step into, and zip up. Employees who hang live birds also wear gloves. They are issued a new pair of gloves every morning. According to Washington, if an employee looses a glove during the day, Respondent issues the employee another pair. The gloves are thrown away at the end of the day, and the employee doesn't have to sign for each new issue, according to Washington's testimony.

The next morning, Washington went back to the plant, punched in and began working. Shortly thereafter his supervisor, Alfred McNeil told Washington that Dick Locklear wanted to see him in the Scale House. Washington reported to Dick Locklear and Ralph Allen was also present. Lock-

lear commenced to question Washington as to why he had punched in. Washington responded that he would not have punched in if Locklear had told him not to. Washington testified that locklear had his timecard on his desk at this time. Locklear asked him if he had returned the uniforms that he had at home, that were too small. Washington stated he had returned them and they had been laundered. Locklear then directed Washington to go to the personnel office at 8:00am.

Washington went to the personnel office and awaited the arrival of Wowra. When Wowra arrived, Washington told him about the circumstances of his having received the uniforms and gloves. According to Washington's testimony, Wowra told him he didn't

think there should be any problem about the matter, and that he would call Locklear to find out about it. At that time Washington identified the person who gave him the gloves as the guy from the chilling department he had been in a shouting match with the week before. On cross-examination, Washington admitted that a week before the events leading to his discharge, he and Johnny Hatcher engaged in a confrontation, in which Hatcher supposedly almost ran over Washington and his wife with a jack. Washington was talked to by Dick Locklear, Roscoe McCollum, and Sherwood Locklear. Wowra was aware of this incident. According to Washington, after telling Wowra his version, Wowra allegedly told him he didn't think there should

be any problem about the matter, that he wanted to call Locklear and find out about it. Wowra then called Locklear over, and had Washington wait outside of the office. Shortly thereafter Wowra called Washington back into the office and told him that he Wowra, had a meeting to attend, and he couldn't talk to Washington anymore at that time. Wowra told Washington to come back in on Thursday morning.

The next morning, Washington went back to personnel and met with Wowra and Dick Locklear. Wowra told Washington that he had talked with Hatcher, and their stories did not harmonize. Wowra then advised Washington that he was sorry but Respondent could no longer use him, because he was in possession of smocks that

did not belong to him. Washington asked Wowra if he had talked with Barnes and McCollum, because they had been right there when Hatcher admitted giving him the gloves and uniform. Washington testified further that he asked Wowra if it made sense that he would have gone outside and shown the gloves and uniforms to a supervisor as he had in fact done, if he had stolen them. Wowra allegedly told Washington he had nothing more to say to him.

Kathleen Ferguson, an employee of 19 years duration, testified that on August 23, she went to the supply room to pick up supplies for the eviscerating department. According to her testimony, she went in the afternoon, at about 2:00pm and picked up the supplies. It was Ferguson's routine

to go down to supply, just before the end of the shift, and get the coats for the supervisors and the gloves for the employees. On that day, she was called out to grade turkeys, and left the coats and gloves in the knife room. Ferguson testified that she left the gloves inside a paper towel box inside the knife room. When she returned to get the supplies after grading the turkeys, she discovered the gloves were gone. She told Richard Ferguson, a supervisor and also her husband, that the gloves were missing, and they told Dick Locklear, the Department Manager of Slaughter.

That afternoon, Marion Love, an employee of 26 years, and the brother of Kathleen Ferguson, (a supervisor in the live hanging dock area), was

crossing the street when he observed Washington sitting next to the gate on the parking lot. According to the testimony of Love, (appearing in the record as Johnny Marion Love), Washington was holding some cloth gloves that were used to hang turkeys and some supervisors' white coats above a bag. Love overheard Washington tell these employees that he did not have to worry about the supplies because this was how he got his. Love then saw Kathleen Ferguson who was coming across the street at the same time. Love testified that he was aware that supplies had been missing in the plant, and he told Ferguson that he thinks he's found out where their supplies were getting away to. Love told Ferguson what he had observed.

Ferguson went to the Scale House office and told Dick Locklear, Ralph Allen and Richard Ferguson that, according to Allen's testimony, Washington had the gloves and coats.

At Locklear's request, Allen and Ferguson left the Scale House office and called Washington from across the road. On the way to the office Washington opened the bag he was carrying and pulled out the gloves and the supervisors uniforms. According to the testimony of Allen, Washington told him and Ferguson that he did not intend to take the supplies, and that he was going to bring them back.

Ferguson and Allen proceeded to bring Washington back into the office. Locklear asked Washington why he had taken the equipment. Initially, ac-

cording to the testimony of Allen and Locklear, Washington stated that he found the gloves in a tank. Then Washington said a short dark skinned guy in the chilling department had given him the gloves, although Washington did not identify the individual by name. Locklear then told Allen and Ferguson to take Washington to the chilling department to find the individual Washington claimed had given him the gloves. The three of them went to the chilling department but Washington was unable to identify the employee.

Washington, Allen and Ferguson then returned to the office. At that time, Washington said he had about a dozen pair of coveralls at home. Locklear told Washington to bring the

coveralls to the office and report to him the next morning.

At approximately 7:30am the next morning, August 24, Wowra testified that he was opening his office door when he saw someone running towards him who turned out to be Washington. Wowra testified that as he was opening the door, Washington was saying "Erick don't fire me! I didn't steal those gloves." Wowra further testified that he asked what was going on, because he was in the process of trying to open up and start another day, and this individual comes running across the parking lot, very distraught asking not to be fired. Moreover, according to Wowra's testimony, Washington stated that he bought the gloves, he didn't steal them, he didn't do it. At

that point in time, Wowra had no idea what Washington was talking about. Wowra told Washington to calm down, and while Washington talked, Wowra took notes. Washington accused Dick Locklear of hassling him and said that, "some dude in chilling" sold him the supplies. Washington further stated, that he had nine sets of smocks at home and that people in the plant sold clothes all the time. Wowra then called Locklear into the office with Washington. At that point Washington changed his story and said that some dude in chilling gave him the supplies. He denied stealing it. Wowra advised Washington to leave the premises so that he could investigate the situation, and for Washington to return at 8:00am the next day.

At approximately 9:00am, Wowra was leaving his office when he was confronted by Washington in the parking lot. He reminded Washington that he had instructed him to leave company property. Washington kept reiterating, "don't fire me some guy gave me those gloves." Wowra told Washington that without the guy's name he didn't have much to go on. At that point, Washington told Wowra that it was the guy with whom he had gotten into an argument a week earlier. Wowra was aware of the incident involving the employee Johnny Hatcher. Wowra returned to personnel and started to investigate Washington's situation. He talked to Kathleen Ferguson and Marion Love. His notes of those discussions were received into evidence.

While Wowra was investigating, Dick Locklear called him, and said he had heard Johnny Hatcher tell the plant nurse that he had given Washington the gloves in the morning. Wowra did not believe this because the gloves were not missing until 2:30 or later in the afternoon.

Wowra also took detailed notes of his conversations with Locklear, Love and Washington. They were also received into evidence.

When Wowra's investigation of the situation was completed, he concluded that Washington had been in unauthorized possession of company property. Wowra and Locklear discussed the situation and agreed to terminate Washington. Washington was informed of the decision the next morning.

Conclusion and Analysis

Although, Washington was demonstratively vocal in the walkout, he was but one, of hundreds of employees.-

I find no evidence to support a finding of anti-union animus directed towards Washington. Washington testified that Johnson told him there would be a raise on Labor Day. He admitted specifically that Johnson did not bring up a union. Nor was he threatened[8] with reference to the walkout.

Washington acknowledged that when he returned to work after the walkout, Dick Locklear and Wowra put him in jobs in other areas to aid in his comfort, because he complained that his hand was bothering him. He was

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[8] Independent allegations of Section 8(a)(1) of the Act will be discussed infra.

moved to several different jobs because certain jobs aggravated his hand. This does not appear to me to be an employer who is harboring revenge, or seeking to take reprisals.

There is a dearth of evidence that Washington solicited so much as one union authorization card.

Record evidence, by way of testimony and documentation, demonstrates that Washington's status was fully and completely investigated. Respondent then concluded that Washington was in unauthorized possession of company property and that termination was warranted.

Respondent produced evidence of other employees who were terminated for similar reasons. Bryant was terminated for signing a false name to

get $10 in food coupons. McClaurin was discharged for giving false information regarding a paycheck. Parks was terminated for giving false information on her application. Pate was discharged for theft. Franklin Smith was discharged for stealing two Bar-B-Qued chickens.

Hatcher, an alleged discriminatee[9], threatened Wowra that if a problem he was having wasn't resolved, he was going to the Labor Board. In the face of this, Hatcher wasn't terminated, because Respondent simply did not believe that Hatcher had found the gloves or given them to Washington.

I was most unimpressed with Washington's credibility. He was evasive,

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[9] Hatcher's case was withdrawn and he was not called as a witness.

indefinite and I believe his story to be a consummate lie. That his testimony was concocted, was obvious to me.

By way of contrast, Respondent's witnesses to the Washington episode, were explicit, unambiguous and appeared to me as making a honest effort to be exacting in their testimony, I fully credit those witnesses.

In February 1988, Washington was convicted of stealing tapes from a Kroger store. He was sentenced to one year in the North Carolina Department of Corrections. The sentence was suspended on the condition that he pay a fine and stay off of the premises of the store for one year. Suffice it to say, Washington has had honesty problems in the past, although absent the

conviction, I discredit him based on his courtroom exhibition.

When questioned as to whether he knew the "guy's" name, (Hatcher), he changed his answers some four times.

Washington's answers to questions propounded by me and Counsel for Respondent where generally indefinite and amorphous.

His testimony that supervisors, including Wowra, made statements to indicate that he had no problem, "don't worry--be happy," was completely contrived in my opinion.

Respondent has more that adequately met his *Wright Line* burden. Accordingly, I recommend that the 8(a)(3) allegation as to Washington be dismissed.

Phillip Freeman

Freeman was employed by Respondent during two time periods. He was first hired on December 11, 1987, and eight days later walked out and quit. He was hired again on June 15, where he worked in the chilling department until August 31, the day of his discharge.

Freeman participated in the walkout on Tuesday and Wednesday. He, and other employees, solicited signatures on the parking lot and in the canteen, and signed union authorization cards and also attended union meetings. He testified further that union representatives were giving out cards, and a lot of employees were signing cards. There is no evidence that management

spoke to Freeman during his organizational activity.

Freeman testified that on the day of the circumstances leading to his discharge, August 30, he reported to work for his normal shift at 7:25am. He denied being intoxicated at work on that day, but admitted he had a beer that morning before he reported to work. He testified further, that this was not the only day he had a beer before reporting to the plant for work.

When he reported in that day, according to Freeman, the department was working shorthanded, and he asked Barnes, the supervisor, for additional help. After the line started up, he yelled at Barnes apparently trying to get more help. Freeman testified that

during the break period, sometime between 10 and 11:00am, he went to the parking lot but did not drink any alcohol. When the employees returned from their break, two supervisors helped them on the processing line. After about 45 minutes they left, and Barnes came to the line where Freeman on several occasions told him that the employees needed more help. Freeman testified that he told Barnes that if they did not get any help, they were going to shut them down.

Freeman further testified that Barnes got two more people to help out, but the turkeys started overflowing and falling on the floor. According to Freeman, it was a chaotic situation, with people running around and screaming. Freeman acknowledged that

he commenced to tell other employees what to do, and Barnes came on the scene, looked around and told Freeman that he was hollering at his troops, and that he would have to get off of the line if he did not stop hollering at the people. According to Freeman, Barnes told him that if he did not stop hollering at the troops, he would be sent to see McCollum. Freeman responded that he did not work for McCollum, and Barnes then pulled him off the line. Freeman allowed that he was upset and told Barnes that he had been asking for help. He also admitted that he told Barnes to get the hell off of his back. Freeman's brother, Calvin Brown, came into the area, and Barnes let them walk to the hallway, where Freeman acknowledged

that Brown was trying to calm him down.

Freeman testified further that Barnes came into the hallway with a quality control employee named Vic. Brown was also in the hallway. Allegedly, Barnes told Freeman that Vic said that he smelled alcohol on Freeman. Freeman responded that he knew damn well that there wasn't anybody intoxicated, and who in the hell was Vic who said he smelled alcohol? Freeman told Barnes at that point, that he had seen Vic drinking on the parking lot and that he was helping them get rid of Freeman because he was one of the last chilling department employees that walked out on strike.

Freeman testified that he was engaged in a heated argument with

Barnes, when Roscoe McCollum walked up and told Freeman to go ahead and get the hell out of the plant. Then, according to Freeman, a security guard came and told Freeman to leave. As he was leaving, Freeman testified that he shook hands with Barnes and McCollum and they said that everything was okay. Freeman conceded that the guard could hear the discussion because he, Freeman, was shouting, as was McCollum.

Freeman testified that while waiting for his brother across the street from the plant, he approached Wowra who was walking from the plant to personnel. According to Freeman, he was four, or four and a half feet, from Wowra, and told him that he wanted to talk to him because McCollum had

fired him. Wowra told Freeman to see him in the morning.

The next day, Freeman went to Barnes who allegedly told him everything was okay, but that he needed to see McCollum. According to Freeman, he talked to McCollum, telling him that he could come back to work, but to see Wowra for his timecard. Freeman met with Wowra, who he said that he had statements and allegations of misbehavior, or misconduct and belligerence or insubordination. Freeman testified that at the bottom of Wowra's list was possible intoxication. Wowra told Freeman that he was terminated, and Freeman responded, the reason that Wowra was terminating him was because he knew that Freeman was

one of the four Wowra had talked to in the parking lot.

Respondent presented several of the witnesses who had testified with regard to the Washington discharge.

Barnes teestified that after the second break, he heard loud hollering that sounded like somebody was giving orders. Barnes was in the holding area, near cut-up, when he heard the yelling.

According to Barnes, Freeman was acting very erratic and was excessively loud. Barnes took Freeman to the side and asked him what was wrong. Freeman responded that he was attempting to get the people motivated, and Barnes told him it was not his job to motivate the people, and his hollering was making the people upset and tense.

Barnes stated it was his, Barnes job, to motivate the people.

Barnes testified further that he noticed that Freeman's eyes were red and watery, and he asked Freeman if he had been drinking or smoking. He testified that he was not talking about regular cigarettes he was referencing marijuana, or whatever. Barnes told Freeman that it looked to him that Freeman was under the influence of something, because his behavior was not normal, and Barnes asked him to calm down. According to Barnes, Freeman continued to curse, although Barnes because of the passage of time, did not remember the words used. Freeman asked him if he was accusing him of being under the influence of something.

McCollum testified that he saw Freeman come in the hallway near the nurse's office cursing. He approached Freeman and asked him what the problem was. McCollum further testified that Freeman had a "real strong smell," of alcohol on his breath. Barnes entered the area, and McCollum asked Freeman what he had been drinking. Freeman responded that he was in with Barnes, and Freeman stated to them "you mother fucker, you're all together. I ain't had anything but one beer to drink." Barnes testified that Freeman was raising up his arms and making very emotional movements, and that Brown was trying to hold him down.

Brown testified that he was attempting to restrain Freeman, and that he came over to the area because he

was told by another employee that his brother was arguing in the hallway. Brown got between Freeman and McCollum, trying to calm Freeman down and he, as testified, could also smell alcohol on Freeman's breath.

Victor Smith testified that Brown was holding Freeman back. He also testified that Freeman appeared to be under the influence and was acting different than he usually acted. He also stated he could smell alcohol and testified that Freeman appeared to be under the influence and was acting differently than he usually acted. He also stated that he could smell alcohol and that Freeman's teeth were green. Smith and McCollum testified that McCollum told Freeman he would have to leave the plant.

Wowra testified that about 2 to 2:30pm, Freeman approached him and got "in his face." Freeman stated that he had been fired, that he was only tying to raise the morale of the employees, and should not have been fired. Wowra testified that Freeman reeked of alcohol, his eyes were bloodshot, his speech was slurred, and his gait was wobbly. The next morning Wowra spoke to Barnes and McCollum, about Freeman's condition on the day prior. McCollum denied telling Freeman that everything was okay, and he could go back to work. When Freeman was called into Wowra's office, he was told by Wowra that McCollum fired him and that he, Wowra thought it was for cause. He gave as the reasons for the termination, violating company rules con-

cerning intoxication, disorderly conduct in the plant, insubordination and leaving the work area.

Conclusion and Analysis

There is a paucity of evidence that Respondent's discharge of Freeman was in any way motivated by any anti-union animus. If anything, the evidence is quite to the contrary. By his own admission, Wowra offered to return Freeman to work on Friday, August 5, after the walkout. Freeman preferred to return instead, on Monday. That was fine with management. When he did return on Monday, he talked to at least one supervisor, Gilchrist, who did not allude to his participation in the walkout. Nor does this record divulge that any other supervisor alluded to it. More-

over, on Monday, August 1, prior to the en masse walkout, Freeman was allowed by management to go to Virginia to look for another employee, Fields, who had walked out on July 28, with Freeman and the two others. Two weeks after the July 28, walkout, and during the first week Freeman returned to work after the en masse walkout, supervisor Gilchrist allowed Freeman to leave work, purportedly to aid his brother in obtaining a driver's license.

As regards Respondent's knowledge of Freeman's union activity, he testified that McCollum and Sherwood Locklear were in the canteen when he engaged in handing out union distributions. He specifically admitted that neither McCollum or Locklear spoke to

him about said union activity. In my opinion this is insufficient to prove knowledge. Assuming arguendo it does, my decision would be the same, the discharge was for good cause. Freeman's testimony that he told a supervisor, Leggett[10] that he gave a statement to "the man from D.C.," in my opinion was pure fabrication, and I discredit him in this regard. His credibility in general is discussed infra.

Leggett, whom I credit, denied that Freeman told him this. Leggett was a straight forward and unequivocal witness.

Leggett characterized himself as an assistant supervisor in the chill-

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[10] The supervisory status is denied by Respondent.

ing department. He testified he punches a time clock and that he can allow an employee leave to get a drink of water or to go to the restroom. He testified furthermore, that he does not write people up, and there is no evidence that he can effectively recommend discipline. Moreover, Leggett testified that if an employee for some reason, needs to go home he cannot grant that authority. What he usually does is get together with Barnes, to let Barnes know what the situation is. Barnes then makes that decision as to whether the individual can leave or not. Leggett also participated in the walkout. I therefor conclude that Leggett is not a supervisor within the meaning of the Act.

It is apparent to me that Freeman falsely colored his testimony in an effort to distort the truth in his favor. I discredit him. It is clear from the record that he lied about aiding his brother to obtain a driver's license. He lied to Respondent and he lied on the witness stand.

I resolve any conflicts in testimony between Freeman and Respondent's witnesses in favor of Respondent's witnesses. These witnesses have been discussed earlier. Throughout the hearing, Wowra was an impressive witness, with a remarkable memory, aided by copious notes made in the normal course of business. Even more important, I am persuaded that Wowra was an honest witness, who proffered precise testimony.

The employee's guidebook provided by Respondent states that intoxication during working hours is an offense which will result in immediate discharge. The handbook or guidelines, also states that disorderly conduct in the plant and insubordination are offenses which may result in discharge. The magnitude of the evidence convinces me that Freeman violated these rules. Moreover, his conduct was investigated by Wowra who personally observed the intoxicated state Freeman was in.

I conclude that Respondent has met its burden as set forth in Wright Line, a division of *Wright Line, Inc.*, 251 NLRB 1083. Accordingly, I recommend dismissal of the 8(a)(3) allegation as it pertains to Freeman.

Heyward Andrew Davis

Heyward Andrew Davis, commenced to work at Respondent's plant on June 6. He was subsequently terminated on September 6. He worked in the overwrap department, a part of cut-up, and reported to Leadman, Henry McPhaul.

Davis testified that he participated in the August 1, walkout and that he and Leadman McPhaul encouraged other people to leave the plant. After walking out, he signed a union authorization card, talked to employees about the Union, and engaged in handbilling at break times. Davis also gave interviews to the media and was quoted in an article published by the Fayetteville Observer. He was also interviewed on television and

discussed the Union's organizational campaign, wages, working conditions, and medical conditions. This interview was shown on TV in the local Fayetteville area. He also wore a union T-shirt to work on two or three occasions.

Evidence reflects a history of conflict between Davis and an Oriental employee, Chong Atkins. Atkins' perception was that she was being harassed by Davis, and she complained to management to this effect on several occasions.

McPhaul, the Leadman, testified that on Saturday, September 3, Davis was assigned to sawing necks. While McPhaul was talking to another employee he heard Atkins holler. He asked Atkins, who was holding her hand what

was wrong, and she replied, "that white honky throwed a neck and it hit me on the hand." McPhaul then checked with three other employees, Nunnery, McCray, and Monroe. These employees confirmed that Davis had thrown a turkey neck.

McPhaul approached Davis who admitted throwing the neck, but stated that he did not mean to hit Atkins. McPhaul then took Davis and Atkins to McCollum's office.

McCollum testified that Atkins was crying and that the back of her hand was red and bruised. Davis complained to McCollum that for two or three weeks, Atkins had been cursing at him and accused him of talking about her. Furthermore, Davis told McCollum that he only gave the necks a

"slide." McCollum testified that he intended to suspend Davis for the rest of the day, but that Davis was extremely upset and he promised to work with Atkins and not cause anymore problems. McCollum therefore, decided to give Davis a warning and send him back to work.

On Tuesday, September 6, Atkins went to see Brenda Branch, an employee with 11 years service, who is Respondent's Food Service and Deli Manager. Atkins told Branch that Davis was picking on her. She also related the turkey neck throwing incident, and showed Branch the bruise on the back of her hand. Branch testified that Atkins also stated that her car had been painted on Saturday and that she was sure Davis did it. Furthermore,

according to Branch, Atkins was upset and talking fast. Branch told Atkins to go back to work, and she then called Wowra to inform him about the problem.

Wowra then met with Atkins, Davis, McPhaul and Branch. His notes reflect that on August 1, the day of the walkout, Davis pushed Atkins to go outside to strike. Atkins rushed back and told Davis to leave her alone. Davis accused Atkins of selling company information to Johnson. This statement regarding selling information to Johnson, apparently occurred on August 3, when Davis called her a "chicken." Atkins at the meeting, also stated that on September 2, sometime in the morning, Davis laughed at her and stuck his tongue out at her.

She then related the neck throwing incident. Furthermore, according to Wowra's notes, and testimony, Atkins stated that one hour after McCollum sent them back to work Davis told her, "I will fix you good." At the next break period, Atkins saw Davis walk by her car in the parking lot. Later she noticed that her red car had been spray painted white. She did not actually see Davis paint her car. Both Davis and Atkins each accused the other of harassment and cursing. Wowra then decided to speak to other employees who worked in the same area as Atkins and Davis. He testified that after talking to the three other employees he considered it a "draw" and decided to write both of them up.

Later that day, according to the testimony of Wowra and Johnson, the two of them were talking and Johnson asked Wowra what he had done about the Atkins/Davis situation. Wowra stated he had written them both up. Johnson Responded that he had had enough of Davis and told Wowra to fire him. Wowra had McCollum send Davis to his office where Wowra informed him that he was being terminated.

Conclusion and Analysis

Although Davis was active for the Union, the law is clear that this does not cloak him with invincibility.

The record manifestly demonstrates a pattern of harassment directed by Davis toward Atkins. Whether Davis's attitude was because she was Oriental (Johnson thought so), or

because she was not supportive of the walkout, I'm not sure. Perhaps it was a mixture of both.

On the first day of the walkout Davis tried to push Atkins out of the plant. Then he accused her of selling information to Johnson. McPhaul testified that Davis called her and "old hag" and a "gook." McPhaul also testified that on only one occasion he heard Atkins refer to Davis as a "honky."

Although Davis denied throwing the turkey neck, the preponderance of evidence clearly reflects that he did. In his affidavit, Davis admitted throwing the turkey neck. Witnesses, some of whom were Counsel for the General Counsel's, testified that Davis threw the neck. Monroe, who

stood near Davis while working, testified that at the time of the incident she heard Davis say, "I believe Ms. Lois (McCray) is asleep, I'm going to wake her up." Monroe responded that the employee was not sleeping, at which point Davis, "pitched a neck down the line." Monroe testified that she heard "Jonathan"[11] cryout that it hit her. Nunnery, another General Counsel witness, also testified that she saw Davis throw the neck that hit Atkins on the hand. I discredit Davis and fully credit Respondent's witnesses, who testified in a very forthright manner.

Wowra and Branch, investigated the turkey neck incident and the other

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[11] Although the transcript reads "Jonathan" I believe the witness said "Chong" (Atkins).

alleged acts of harassment. Observing Wowra on the witness stand it became obvious to me that he became exasperated with both Davis and Atkins. He therefore issued warnings to both of them.

It was later that day when Johnson learned of Wowra's measures. Johnson, who didn't even know who Davis was, other than by the complaints to him by Atkins, told Wowra to fire Davis because of the trouble he was causing. Johnson thought Davis was picking on Atkins because she is "Chinese." He testified, "you can't have people throwing turkey bones, a turkey neck can hurt you, and pushing stuff around, pushing people around, and causing, just causing trouble.

You just can't put up with that with as many folks as we got there."

Although heresay, Respondent introduced documents reflecting that other employees were fired for disorderly conduct and harassment.

I am convinced by a preponderance of the evidence, that Johnson terminated Davis because of his harassment of Atkins and not for any of his union or concerted activities. Respondent has met its *Wright Line* burden. I therefore recommend that the 8(a)(3) allegation relating to Davis be dismissed.

Alfreda Hammond

Counsel for the General Counsel contends that Hammond was discharged because of her union activities in violation of Section 8(a)(3) of the

Act, and Respondent refused to rehire her, because she filed charges and gave testimony before the Board in violation of Section 8(a)(4).

Hammond was initially hired in July, 1987. She was discharged on August 19, 1987 for excessive lateness and unexcused absences. She was re-hired in February, 1988. On April 21, Hammond was discharged for cursing a supervisor, Eric McPhatter. McPhatter testified that when he directed Hammond in her work, she kept telling him that "this mother fucking shit ain't right." Furthermore when McPhatter told her that they should go down stairs and talk about it she continued to loudly call him "all kinds of mother fucker" and according to McPhatter, all the employees in the area heard

her. McPhatter took Hammond to McCollum and terminated her. On her way out, Hammond told McPhatter, "if its the last thing I do, I'll get you." Hammond admitted the specifics of this incident, and on her termination notice it states "do not rehire."

Her union activity consisted of passing out six union leaflets to six employees. She testified she did this on two occasions, lasting three to four minutes. There is no evidence that management observed this. Hammond also claimed that she wore a union sunvisor although she does not mention this in her affidavit which was given on October the 18, three weeks after her discharge.

In August, during the period of the walk out, Hammond approached Wowra

and asked him if she could be rehired. She acknowledged in her testimony that Wowra told her that her file reflected that she should not be rehired. Furthermore, Wowra told her that he was going to give her one last chance, and that if she messed up this time, she would not be rehired. Wowra testified he told her he was putting her back to work for the last time, and if she got involved in anything, not to look to him to reinstate her. Moreover, Wowra wrote a note, in evidence, in the presence of Hammond stating just that. The note is dated August 4, and it reflects that Hammond had been terminated two other times and that she was "approved for rehire last time." Wowra signed the note.

On September 26, Wowra conducted a meeting where film strips were shown. At the conclusion, he invited questions from the assembled employees. Hammond asked Wowra why the line was moving so fast. She testified that a supervisor, Alphonia (Tony) Ashford replied that the line was not running too fast. Hammond testified that she told Ashford "that someone was going to accidently pop a knife (into Ashford) because she was so evil."

Wowra testified that Hammond told Ashford, "I'll stick a knife up your ass." Ashford testified similarly but went on to state that Hammond never used the word "accidently." Bernita Heard, the second shift night secretary, testified thusly, "Alfreda got

angry with her and told her, she said, nobody don't like you. She said, that's why nobody don't like you because you have a nasty attitude and she said one day somebody's going to stick a knife square up your ass." According to her Hammond was not speaking in a normal tone of voice, she was very angry. Theodocia Richardson, who works the second shift at the first aid station, and was present at the meeting, testified that Hammond was "getting all out of hand," and she heard Hammond say "something about the lady getting a knife stuck in her ass."

Wowra stopped the meeting immediately and sent the employees out. Because it was late, he decided to wait until the next morning to make a

decision. He made the decision to terminate Hammond the next morning, and the termination notice which he drafted, states that Hammond was being terminated for disorderly conduct in violation of Plant Rule 9.

Hammond testified that on the Friday following her termination, September 30, she spoke to Wowra about the possibility of being rehired. She had returned to the plant to return her uniforms and ID. Hammond filed her charge with the Board on October 4. According to her testimony, Wowra stated that he would hire her back except that she had filed charges with the Labor Board, and he had to wait until their decision came the following Wednesday. She testified she spoke to Wowra again on the day

before the election, October 6, and he told her to wait until the following Wednesday.

Wowra testified that Hammond called him several times and asked that she be returned to work. According to the testimony of Wowra, when she called she told him that she wanted to come back to work, and he responded that he didn't want to go through this again, he had put her back to work for the last time. He made reference to the fact that he had shown her the memo he had written down in front of her, that she would not go back to work at the House of Raeford. That was, according to Wowra, the first call. In her second call she told Wowra again, that she wanted to come back to the plant. Furthermore,

Wowra testified that Hammond stated "I brought a charge against you all and I want to go back." Wowra's testimony, "I said Alfreda I don't care what you've done or what you've told anybody, I'm not putting you back to work for the House of Raeford, period." Wowra testified that he thought by that time she understood what he was saying and simply hung up the phone, refusing to take any other calls from Hammond. He specifically denied telling her he would hire her back, but for the fact that she filed charges with the Board, and he had to wait for their decision.

Conclusion and Analysis

I vividly remember the temper of witness Alfreda Hammond. Seldom have I seem a witness openly display such

hate, rancor and hostility. It is clear to me that she is inclined towards violence, and I am convinced that she threatened to stick a knife in the supervisor. I discredit her version of what she told the supervisor, Ashford. Even leading questions could not rehabilitate Hammond.

By way of contrast, Respondent's witnesses, including Ashford, Wowra, Heard and Richardson were confident, and unerring. I credit them. Hammond was hired during the walkout, so obviously she didn't participate in it. Her union activity was minimal. There is no evidence that management had any knowledge of it.

In attempting to explain what she meant by the word "accidentally," referencing the knife incident, she

related two other incidents. Both involved supervisors who were stabbed by employees. Hammond testified that in one incident an employee "accidently" stabbed his supervisor because the employee lost his temper. She admitted that she was mad at Ashford, and conceded that the accidental stabbings weren't "accidents" at all.

She attempted to make light of her comment to Ashford by testifying that supervisor, Wells laughed when she told him what happened at the meeting. Wells denied that Hammond ever discussed the meeting, or the incident with him, and I credit his testimony. Respondent has more than adequately established good cause for Hammond's termination and more than adequately met its *Wright Line* burden.

I recommend that the 8(a)(3) allegation as it relates to Hammond be dismissed.

With reference to the refusal to hire allegation, it is clear that Wowra gave her the last and final chance, when she was rehired for the third time. Wowra, himself, was privy to her dangerous threat.

Her testimony that Wowra told her he couldn't rehire her because she filed charges was made out of whole cloth--a pure fabrication. She hadn't even filed charges on the day she testified that Wowra made this alleged comment.

Accordingly I recommend that the 8(a)(4) allegation, as it relates to Hammond be dismissed.

Larry Jones

Larry Jones testified that he worked for Respondent from February 12,. until his discharge on September 28, in the Eviscerating department, at the draw line position. His supervisor was Ralph Allen.

Jones participated in the August walkout. After he returned to work on August 4, Jones passed out union leaflets and cards at the gate, once or twice a week, for about four or five weeks, according to his testimony. Jones testified that he was seen passing out the union literature by supervisors Ralph Allen, Richard Ferguson, and Dick Locklear. Jones testified that he spoke in favor of the Union at employee meetings. At one meeting, which was conducted by Wowra, the

employees were told that they did not need a union. According to Jones, he responded that the employees did need a union, because they had been having problems for the last ten years, and no one had given them anything, that they wanted something in writing.

On the morning of September 27, at approximately 7:00am, Jones walked off of his line position in order to plug in an electric fan. He testified that his co-workers were complaining about the heat. Jones admitted in his testimony that he did not have permission to leave the line, but avers that on several occasions he was ignored when he asked supervisor Allen for permission.

Allen denies that he was ever asked for permission. An employee,

Brenda Johnson, a drawer who worked directly across from Jones, also testified that Jones did not ask Allen permission to plug in the fan. She also testified that it was not hot that early in the morning. Allen also testified that a fan would not be needed at that time of the morning, 7:00am.

If Jones had been able to walk a straight line directly to the fan it would have been approximately 15 feet away. Because of the line, Jones had to walk a distance of approximately 30 to 40 feet around the line in order to get to the fan. He testified that the line did not stop as a result of his absence from it. He is refuted by Allen, and employee, Brenda Johnson. Johnson testified that when Jones left

the line, the inspectors for the United States Department of Agriculture stopped the line because of undrawn turkeys. Allen testified that he was sure the line stopped. He testified "I'm sure. You're going to pay attention. When the brother down the line stops you're going to see what's wrong. With the eviscerating line we can't afford to stop the line. That would harm some people. Working that down time is expensive."

When Jones returned to his station, he was confronted by Allen, who asked him why he had left the line. Jones became upset and started cursing Allen. Johnson testified that Jones told Allen, " I'm a mother fucking man just like you, is . . . . me and you get in our pants the same way and if

you come on the outside I'll beat your ass." Johnson testified further that Allen did not curse or raise his voice. The outburst was in the presence of other employees.

Allen testified that he told a lead lady to put someone in Jones place. He then told Jones to come with him to the time clock. According to Allen, Jones continued to curse him stating he was a mother fucking man. Allen then took Jones to see Dick Locklear where the situation was discussed, and according to Allen's testimony, Locklear told him that Jones was discharged. After this Jones went to see Wowra. Wowra spoke to Allen and Jones and decided to suspend Jones until the next morning so that he could investigate the circumstances.

He subsequently talked to Allen again and reviewed Jones personnel file. Jones had previously received warnings regarding his attendance on June 17, 20 and September 15. Wowra deduced that Jones was the recipient of 65 attendance incidents during a period covering approximately 200 days. These incidents include both unexcused absences and arriving last at the production line.

The next day, September 28, Wowra met with Jones and told him of his poor attendance and that he was being fired for cursing a supervisor and leaving the line. Jones responded that the cards lie and that he is being fired for speaking up at the employee meetings. Wowra made notes of his discussions which were received

into evidence, and reflect among other things, the warnings Jones received regarding his attendance. Wowra showed the cards to Jones who at the conclusion of the discussion according to Wowra said "bye (sic), sucker," and Jones left Wowra's office.

The termination notice reflects that Jones was fired for leaving the line without permission, using profanity toward a supervisor, and engaging in disorderly conduct. The document also reflects the words "tied to extreme attendance."

Conclusion and Analysis

Jones unrefuted testimony is that he passed out union literature in the presence of supervisors on many occasions. He acknowledges that no man-

agement representative ever discussed these activities with him.

Respondent acknowledged by way of testimony that Jones, and other employees, spoke out in favor of the Union at Wowra's employee meetings. Wowra testified that Jones asked him why he didn't want a union. Jones also testified that he asked Wowra why management was concerned about a union all of a sudden. Jones stated that he had been in a union at Fort Bragg, and he thought a union was good. Wowra responded, *inter alia*, that he didn't feel it was a good way to do business. There is absolutely no evidence that Wowra, or any other management representative, demonstrated any animus toward Jones because he articulated

pro-union sentiments at an open meeting.

Wowra carried on a thorough investigation, and took notes, which are in evidence, of his discussions with Allen and Jones. There is assuredly no basis for a finding that Respondent discharged Jones in violation of Section 8(a)(3) of the Act. It is undisputed that Respondent did not engage in any 8(a)(1) activity vis-a-vis Jones.

Nor is there any history of unfair labor practices committed by this Respondent.

Jones, a short term, eight month employee, didn't display any particular attributes during his tenure, for Respondent to consider him above average or valuable employee. To the

contrary, his attendance record[12] was deplorable. Wowra reviewed his record in an effort to ascertain if there were any extenuating circumstances. What he found was Jones' attendance record. This did not serve as a basis for his discharge. It served as another negative when considering the totality of Jones' conduct.

I don't consider leaving the line gross misconduct, although I can't substitute my judgement for a reasonable business justification.

What <u>is</u> gross misconduct, is what followed. Here is an employee who curses at his supervisor, threatens to ". . . . if you come on the outside I'll beat your ass," all in the pres-

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[12] Including lateness to the line.

ence of other employees. Jones left the line and engaged in disorderly conduct, all in violation of plant rules. Respondent had more than ample reason for firing him, and I so conclude. Again, Respondent has more than adequately satisfied its *Wright Line* burden.

I specifically credit Wowra who I've discussed earlier. I also specifically credit Allen and Johnson. They testified in detail, were unequivocal and evidenced an assuredness in their testimony. Allen in particular, strove to be fair. He related facts as he remembered them, without embroidering.

Conversely, I find Jones not worthy of credibility. His focus was to prevaricate and distort his testi-

mony, with a view towards reinstatement and compensation, neither of which are legally warranted.

Counsel for General Counsel contends that she produced an "overwhelming" array of witnesses:

Darlene Washington
Helen Daniel, an alleged discriminatee
Jayne Foreman
Jennie Cuttray
Ernestine Bethea, an alleged discriminatee

These witnesses, according to Counsel for the General Counsel, testified that employees left the line without supervisory permission, to plug in the fan, talk to other employees, get water or ice, get tissue to wipe their faces and various other personal endeavors. According to the testimony of some of the witnesses, what this required, was to have some-

one hold the turkeys for the individual leaving the line.

In as much as I believe the line stopped, no one was holding the turkeys for Jones.

The employees who testified that employees left the line without permission or penalty, testified in a vacuum and their testimony ran hollow. Foreman, testified that the line did not stop, although she admitted that she had never been asked about the incident until the morning on which she testified, approximately one year after the incident. Bethea testified that in the event some of the employees want the fan on and some of the employees want the fan off, a majority vote is conducted on the production line. This is absurd. I do not con-

sider these witnesses credible. Even if credited, their testimony has little relevance, because, as stated earlier, the events occurring after Jones left the line, were certainly a basis for termination. I therefore recommend that the 8(a)(3) allegation as it relates to Larry Jones be dismissed. See *Wright Line*, Supra.

Helen Mae Daniel

Daniel was first hired by Respondent in 1974. She was terminated on June 16, for stabbing another employee, Jessie Williams. Daniel admitted that she "cut" Williams. She was rehired on July 19. Documentary evidence reflects that Respondent considered her an experienced employee who would not require training or preparation.

On November 10, a line supervisor, Millie Locklear, asked Daniel to cut the bars of the turkeys. Cutting bars is a function whereby an employee utilizing scissors cuts under the breast so as to be able to insert the legs. Richard Ferguson, a supervisor, had been cutting bars prior to Daniel arriving, because no one else was available to do the job. Daniel called another supervisor, Ralph Allen, over after an hour to complain about her job assignment. Allen testified that Daniel said to him, "I'm tired of this mother fucking shit." Allen asked Locklear to replace Daniel and to send her to his office. When Locklear told Daniel to go to Allen's office she replied, "yes, got damn it, I want him too."

A witness for the General Counsel, Jane Foreman, who worked next to Daniel, testified she heard Daniel say, "This damn shit ain't right." Foreman admitted telling Wowra that Daniel "went off on Ralph."

Daniel continued to curse in the office, in the presence of secretary, Bessie Willis and Allen. Willis testified that Daniel cursed for approximately 15 minutes, and that she remembers that Daniel used words such as "damn." Willis also testified that Daniel was raising her voice acting agitated, and Allen maintained a normal tone of voice.

Plant rules provide that the use of profanity is prohibited. Therefore, Daniel was given a written no-

tice for using profanity, which she refused to sign.

Thereafter, when Allen asked her to return to cutting bars, Daniel told him "that she won't on [sic] split next, [sic] cut bars, she won't do nothing." Allen then told her that if she didn't want to do what he told her to do, then he couldn't use her. Daniel admitted that Allen gave her the choice of returning to cutting bars or seeing Wowra.

Conclusion and Analysis

The record reflects that Daniel engaged in union activity. She testified that she wore a union bottom and hat to work. She further testified that Dick Locklear told her to remove them. This independent 8(a)(1) allegation to be discussed later.

There is nothing in the record to suggest that Respondent, motivated by Daniel's union activity, directed any anti-union animus towards her.

Respondent avers that it terminated Daniel for disorderly conduct and insubordination. In my view Respondent did not seize upon a pretext to discharge Daniel. After his investigation, Wowra contemplated over night what action to take, if any.

I credit Allen's version of the profanity, and specifically discredit Daniel. Daniel reminded me of Alfreda Hammond. She appeared to be seething and harbored a reckless disregard for the truth. I believe that a certain amount of profanity was, and is, tolerated in the plant. It seems to me that Respondent views this as going

beyond the pale. I certainly do. Moreover, Daniel refused to go back to work, even after given the option.

Allen who was very credible, and didn't appear to be motivated by any anti-union consideration. I found him to be exacting. I believe he sincerely tried to be accurate and remain neutral. Daniel in my view, obscured the facts relating to the incident.

I believed that Wowra was distressed with regard to taking action against Daniel. She testified that Wowra told her he was up all night attempting to make a decision, he had no choice but to fire her. She acknowledged that the day before, she told Wowra she knew she was going to be fired. When told that she was being fired she replied, "no problem."

She shook Wowra's hand and hugged personnel manager, Russell.

I firmly believe that Daniel was neither shocked or surprised by her termination. I believe she expected it, and further I don't believe that she herself felt that she was discharged because of her union activities.

Accordingly, I recommend that the 8(a)(3) allegation as it relates to Daniel be dismissed. See *Wright Line* 251 NLRB 1083.

Ernestine Bethea

Bethea commenced to work for Respondent on July 21, 1986. She had attendance problems from the beginning and throughout her employment.

In 1987, she was absent or late 116 times. From January through Ju-

ly 14, 1988 she was absent or late one day out of every two weeks.

On July 14, Wowra discussed Bethea's poor attendance record with her, and told her it would have to improve or she would be terminated. She also received a written warning on this date.

Bethea testified that she had an accident on August 15. She went on leave August 16 and did not return until January 3, 1989.

On March 7, 1989, the Respondent announced and disseminated a new absenteeism policy. Respondent assessed "occurrence points," for absences and latenesses. The new policy was put into effect as of April 1, 1989. As of that date all employees would start with a "clear slate." Under this

policy an employee is terminated if they accumulate 8 occurrences (points), at any time." The policy is very detailed and covers a multitude of potential situations. Under many circumstances, fractions of points are assessed. Under this policy, there is no latitude given.

A copy of the policy was attached to each employees' paycheck and posted on the bulletin boards. It too, was posted on the bulletin boards, and printed in the company newsletter. This addendum specifically addresses, "working Hours/Doctors/Dentists Visits."

Within the first week of the implementation of the new policy, Bethea was absent for three days and received two points. She received one

point for a two day absence on April 2 and 3, 1989. Pursuant to the policy, one point is assessed for two consecutive sick days.

She received a second point for an absence on Friday, April 7, 1989. A doctor's note reflects that she was ill on that day.

Bethea was assessed a third point when she was sick on April 12, 1989, and did not report to work that day. She again had a doctor's note but again, pursuant to the policy she was assessed one point.

Wowra testified he spoke to, and counseled Bethea in Allen's office, after she had been assessed three points. Wowra met with 20 to 30 other employees who had three occurrences. Bethea acknowledged that Wowra spoke

to her in late April[13] or early May, and showed her a sheet reflecting a lot of absences. She also conceded that Wowra told her that he counted times when she had doctor's notes, and he had to go by what the policy said, that if she were absent or late another time she would be suspended.

On April 13, 1989, Bethea arrived to work late and received 1/2 of a point, bringing her total to 3 and 1/2 occurrence points.

Latenesses to the line on six occasions in April, May and June 1989 resulted in her being assessed 1/4 point for each occurrence, therefore totaling 1 and 1/2 points. After

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[13] The Counseling record reflects that Wowra talked to her on April 26, 1989, referencing the date of the occurrence, (absence), on April 21, 1989.

April 20, 1989, less than three weeks under the new established policy, she had accumulated 4 and 1/4 points. As stated earlier, she was absent from work the entire day on April 21, 1989. Therefore she was assessed one occurrence point. She did produce a doctor's note for that day. In as much as she was out of the plant for more the half a day she was assessed one point, pursuant to the policy.

On April 26 and 27 1989, Bethea was again late and received half a point for each occurrence. At that point in time she had accumulated 6 and 1/4 occurrence points. She was placed on a three day suspension, in accordance with Respondent's policy. As stated earlier Wowra counseled Bethea on April 26, 1989.

Bethea left the plant early on June 7, 1989, and was assessed 1/2 point, bringing her accumulated total to 7 and 1/4 points. The next day, on June 8, 1989, she was late to the line. She was absent on June 14, 1989, and was assessed one occurrence point. Although Bethea takes issue with some of her occurrence points, she testified that she did not keep any personal time records. Respondent contends that it terminated Bethea because she exceeded the allowable total of eight occurrences, by accumulating eight and one half occurrences when she was absent on June 14, 1989.

Conclusion and Analysis

There is no question that Bethea actively and openly supported the Union.

The testimony elicited to support a finding of anti-union animus with regard to Bethea is simply not plausible. Putting it another way, she impressed me as a witness not worthy of credibility.

For example, she testified that in January, 1989, supervisor Allen told her to take off her union visor. Bethea provided four affidavits to the Board on September 19 and October 19, 1988, June 21, 1989 and July 25, 1989. She does not allude to the sun visor incident in any of the four affidavits, nor does she attempt to explain her omissions.

Allen denied that he ever saw Bethea wearing a union sunvisor or that he told her to take it, or any other item, off. I fully credit Allen in this regard. My assessment of his credibility, which has been discussed with reference to other witnesses, is just as applicable to the Bethea termination. He was a precise and consistent witness.

I am convinced that the sunvisor incident never occurred.

Frances Lennox, testified that she and her sister, Bethea, have lived together for 3 and 1/2 years. According to her testimony, she called Respondent to report to Bethea's supervisor (Allen), to tell him that Bethea was ill. She also testified that Bethea couldn't make the call herself

a stomach virus, and she also had a problem with her left arm.

Lennox testified that she was able to identify Allen's voice on the telephone, having spoken to him previously, personally and by telephone. According to Lennox, she reported to Allen that Bethea was ill, had been to the doctor, and Allen questioned her "extensively" about her illness. Lennox testified that she asked Allen why he was harassing her and Bethea, and that Allen started cursing her and said "I'm tired of Tina (Bethea), just like Helen Daniel. I'm tired of all this union bullshit." Lennox stated that she told Allen she did not understand why he was talking to her in that manner, and that Allen hung up

when she told him she was recording the conversation.

On cross-examination, Lennox testified that the first time she told anybody involved with these preceding about the phone conversation, was the day before she testified, when she spoke to Counsel for the General Counsel and Counsel for the Charging Party.

Lennox testified further that Allen's tone of voice and cursing were harassing. She had great difficulty recalling any profanity, i.e., the exact words used, other than "dam" and "bullshit."

Based on the totality of the record, Allen enjoyed the reputation of not ever uttering profanities. Interestingly, Mae Helen Daniel, an

alleged discriminatee who was fired for, *inter alia*, using profanity shares this opinion of Allen.

Allen testified that Bethea herself called in, stating she was sick and would be out. During that conversation, someone else got on the line. She identified herself as Bethea's sister. She asked Allen why he was giving Bethea a hard time, and further stated that she was recording the conversation. Allen told her he did not want to talk to her because she didn't work for Respondent and he hung up the phone. He specifically denied stating that he was tired of Bethea, Daniel, or the "union bullshit."

I am convinced that Lennox is an inveterate fabricator, who manufactured a scenario to bolster her sis-

ter's case. I fully credit Allen and discredit Lennox.

The timing on Bethea's termination further demonstrates and convinces me that Bethea was not discharged based on her union activity. For all intents the Union's election campaign was over on October 7, the day of the election. Bethea was terminated many months after her substantial union activity.

Respondent's absenteeism and lateness policy in my opinion, is objective and gives no quarter for discretion. The policy calls for discharge after eight points in a 12 month period. Bethea exceeded the eight points in approximately 11 weeks.

Bethea testified that prior to meeting with Wowra, Allen assured her that with a doctor's excuse she would not be assessed a point. Allen denied telling this to Bethea. Moreover, Bethea acknowledged that Wowra, who supersedes Allen, told her that points are assessed even if a doctor's excuse is provided. Wowra told Bethea that was the policy, and he had to abide by it.

Bethea testified further, that the times she missed from work were occasioned by back and neck problems from the auto accident, and she was also being treated for carpal tunnel syndrome in her left arm. On cross-examination she admitted that she never told either Wowra or Allen about the carpal tunnel syndrome.

The record is devoid of any evidence of disparity in the application of Respondent's policy.

Bethea kept no record of her time. In spite of this, she challenges some of the latenesses to the line. Bethea testified that when she returned to work, after being absent, she arrived 15 minutes early so as to enable her to arrive at the line on time. She went to Allen's office to get her timecard and give him the doctor's note. According to Bethea, Allen made her late arriving at the line, by going inside the plant and making her wait in his office. Later she testified that on June 8, 1989, she came in early and was delayed by Allen. She testified she was absent on June 7, 1989. She stated that

Allen had her timecard, and when he returned from the plant he said he would write on her card that she was there at 6:00am. She further complained that she would be late for the line and Allen said to get the situation "squared away" with the supervisors.

Allen testified that if such a scenario occurred, he would instruct Bessie Willis to write in the time the employee contended he or she was in his office. He conceded that there were occasions when this situation occurred with Bethea, however Allen denied there were any occasions where she came in after being absent, and he made her wait in his office so that she would be late to the line. Bethea's attendance record for 1989

lists her as late to the line on six occasions. On no occasion was she marked late to the line, on the day after an absence, when she would have had to go to Allen's office to get her timecard.

I discredit Bethea and credit Allen with regard to this testimony. She has concocted myths which the credible testimony and documentary evidence firmly refute.

Bethea testified, in an effort to excise a point from her accumulation of points, by maintaining a perfect record for the requisite period of time. According to her testimony, she had not been absent or late for 28 days by May, 1989. She related that at the time Allen terminated her, on June 15, 1989, he told her that he

removed a point from her record. She told Allen she couldn't discern this because of all the points appearing on her record.

When cross-examined, referencing one of her several affidavits, she repudiated her direct testimony, admitting that Allen said nothing about deleting an occurrence point. Allen's testimony supports her in this regard. She never did in fact, maintain a perfect record allowing the deletion of a point.

I conclude that Bethea was terminated for the reason advanced by Respondent and not for any union or concerted activity. See *Wright Line* 251 NLRB 1083. I recommend that the 8(a)(3) allegation as it relates to Bethea be dismissed.

The complaint contains extensive independent allegations of Section 8(a)(1) of the Act. The discussion of these allegations is keyed to the paragraphs of the complaint.

Paragraphs (a) and (b)

Paragraph 9(a) alleges that area manager McCollum, on August 2, informed employees that it had terminated employees who had engaged in protected concerted activities. Paragraph 9(b) of the complaint alleges that on that same day, McCollum threatened employees with termination if they joined other employees and engaged in protected and concerted activities.

Heywood Davis, testified in support of these allegations. According to Davis on Tuesday of the week of the August 2, walkout, McCollum sent word

that he wanted the employees to come inside for a meeting to settle what was going on. He testified that he and 40 to 50 other employees went into the plant, where McCollum told them to clock in. Davis testified that no one was coming in or going out of the plant, because McCollum had told some supervisors and other people to lock the doors. He testified that McCollum told the employees that they had to go back to work, if they didn't, they were fired because the people who were on the outside had been fired. According to Davis, McCollum stated that he had been told this by management, and that the people outside would not be returning to work.

Davis testified further, that when the employees left work that

afternoon, McCollum told them that they would return to work the next day or be fired.

McCollum and management concede that a short meeting was held by McCollum on August 2. On the morning of the August 2 walkout, at approximately 6:15am, McCollum, accompanied by Sherwood Locklear and Wowra, went to the parking lot and spoke to the employees. McCollum told them that they had not been fired and asked them to return to work. Thereafter he met with employees who returned and, according to his testimony, explained to them that Respondent was still going to operate and going to do the best they could. McCollum stated further that some of the employees would be requested to perform jobs that they were

not used to doing, but they were going to operate. The meeting, which was held on the break floor, lasted 45 minutes.

McCollum specifically denied sending word outside to the employees, prior to the meeting telling them they have to come to work, or stating that anybody who did not come into work would be fired. Moreover, he testified that the doors to the plant were not locked. He specifically denied making any statement during the meeting, referencing the people who were still outside on strike, and denied telling the employees that would be fired if they joined the other employees who had walked out.

Conclusion and Analysis

Davis testified that he and 40 to 50 other employees were locked in a meeting with McCollum, and McCollum engaged in conduct violative of Section 8(a)(1) of the Act. Not a single witness was presented to corroborate Davis's version of McCollum's statements. It is patently incredible that McCollum could tell the people on the parking lot that they were not fired, invite them into the plant, and tell those who accepted the invitation, that the employees remaining on the parking lot were fired.

I fully credit McCollum's denials. He was specific and did not waiver. He impressed me as being exacting and clear cut. By way of contrast, Davis, in my opinion, pur-

posely altered the contents of McCollum's comments. I am convinced that Davis completely fabricated his version. Accordingly I recommend that paragraphs 9(a) and (b) of the complaint be dismissed.

Paragraph 9(c)

Paragraph 9(c) alleges that Wowra, Johnson and McNeill created the impression of surveillance.

Wowra is alleged to have created the impression of surveillance on August 5, and during late September.

Heyward Davis testified, that during the week of the walkout, he was standing at a saw where McCollum and Wowra were standing, 4 to 5 feet behind him. According to his testimony, Wowra and McCollum were discussing production. Wowra allegedly stated,

"we know who the ring leaders are and everything, and we will get with these people, and we will try to work things out." Davis testified further that Wowra and McCollum were having a discussion between themselves, not involving other employees. Davis admitted that Wowra made no comment that the ring leaders be penalized. That is his recollection. Both Wowra and McCollum denied any conversation of this character.

I credit Wowra and McCollum that no such conversation occurred. Their credibility has been discussed. I specifically discredit Davis who has been the omnipresent fabricator throughout these proceedings. His credibility has also been discussed.

There is no testimony that Wowra made any statements at meetings or otherwise, in "late September" or at anytime, or that Respondent, or he, personally engaged in, or created, the impression of surveillance.

There is no credible record testimony that Johnson created the impression of surveillance.

Alfreda Hammond, an alleged discriminatee, testified that several days before she was terminated, Bernita (McNeill) Heard, told the supervisors at the white meat table that there was a list of names of union supporters that McCollum had under lock and key. Hammond testified further that on the night of the election while sitting at the nurse's station, waiting for the voting to

end, she heard Heard asking employees who were wearing union shirts, their names and writing them down.

Heard, who was the night secretary, denied that she or McCollum kept any list of union activist, and she further denied ever telling anyone that there was a list of union supporters under lock and key. Moreover she specifically denied keeping such a list.

Heard testified that she had a list of all the employees in the department which she used to release employees to vote. According to her testimony, after the voting, Heard threw away the list and there is no evidence that she noted who did or did not vote.

Heard impressed me as a responsible, credible witness. She did her best to accurately recall, but did not color her testimony. Conversely, Hammond was a vitriolic witness whom I discredit. Her credibility was discussed earlier in the context of her discharge.

I recommend that the allegations contained in paragraph 9(c) of the complaint be dismissed.

Paragraph 9(d)

Paragraph 9(d) of the complaint alleges that Dick Locklear, Wowra, Johnson and Athens Barnes, threatened employees with unspecified reprisals for their having engaged in union and protected concerted activity.

There is no evidence to support the allegation in this paragraph, 9(d), as it relates to Dick Locklear.

With respect to Wowra, the incident and Davis's testimony were discussed under the section addressed as paragraph 9(c).

No testimony was adduced to support the allegation as it relates to Barnes.

Paragraph 9(j) alleges that Johnson threatened employees with discharge because of their union activities on August 15, October 5 and October 7. Paragraph 9(m) alleges that on August 15 and October 5 Johnson threatened employees that their selection of the union as their collective bargaining representative would be futile.

Paragraph 9(o) alleges that on September 21, August 15 and August 5, Johnson threatened its employees with plant closure because of their union activities.

Evidence relating to these allegations was adduced by the testimony of Carl Lindsey, who was led through his testimony relating to Michael Washington's union activity.

Lindsey testified that he attended a meeting, presided over by Johnson, in August, within two weeks of the walkout. According to Lindsey, Johnson discussed a raise, incentive pay and vandalism in the parking lot. Lindsey testified that there were 25 to 30 employees at the meeting, but the only employee he could remember as

being present was "Beatrice," the supply room person.

At some point, according to Lindsey, Johnson allegedly stated "now that we have talked about our problems, lets talk union." Furthermore, according to Lindsey, Johnson allegedly stated that although the law did not permit him to close the plant, he would see to it that it was passed into the hands of his family members. Moreover, Johnson stated he would be obligated by law to sit down and talk with the union representatives, but he did not want to hear anything they had to offer, and as far as he was concerned, they could sit there and drink coffee and look at each other all day. Lindsey testified further that Johnson stated there were trouble makers in

the plant, that they would not be tolerated, and he would make sure the supervisors knew about it and did something about it.

Wowra testified that he was present at this meeting and the first set of meetings, and that the union was not discussed in these meetings. Moreover according to Wowra, "if an employee asked the question, he said--I said, and the president of the Company also said that we weren't there to discuss the Union and that was not the purpose of the meetings. That was made explicit (sic) clear everytime that the question was brought up. That was not the purpose of those meetings."

Heywood Davis, an alleged discriminatee, acknowledged that the

purpose of the meetings held the week after the walkout was to discuss working conditions and problems in he plant. Darlene Washington, Michael's wife, testified that she attended a meeting held on August 8 or 9, and that she did not recall anything said by Johnson about the Union.

Eveyln Segur, a witness for the General Counsel, testified with respect to the first meeting, that nothing was said about the Union.

Krista McNeill testified that at the first meeting Johnson asked what the problems were in the plant, and the employees made several complaints.

Mae Helen Daniel, another alleged discriminatee, testified that she attended four meetings and that three were concerned with the Union. She

testified that at the first meeting conducted by Johnson and Wowra, Johnson stated he was going to fix up the bathrooms and the breakroom. Moreover, according to the testimony of Daniel, Johnson stated he didn't know the plant was in such a mess and that he was going to get with his lawyer and work out a raise for the employees.

Daisy Little corroborated the testimony of Daniel, and added that Johnson promised better benefits, including a credit union.

Ernestine Bethea, another alleged discriminatee, testified that she attended the meeting on August 15, and nothing was said about the Union.

I am convinced by the overwhelming preponderance of the evidence,

that Lindsey concocted his testimony. He is contradicted not only by Respondent witnesses, but also by the Government's witnesses. I recommend that the allegations relating to Johnson in paragraphs 9(d), (J), (m) and (o) of the complaint be dismissed. I further recommend that paragraph 9(d) be dismissed in its entirety.

Paragraph 9(e)

Paragraph 9(e) of the complaint alleges that Sherwood Locklear, Roscoe McCollum, Dick Locklear and Gary Adkins, interrogated employees concerning their union sympathies, desires and activities, and the Union sympathies, desires and activities of other employees.

No testimony was adduced to support this allegation as it relates to Sherwood Locklear.

Heywood Davis testified that while walking down the steps one afternoon behind McCollum, McCollum turned around and asked him if he thought "the Union would get in there." Davis responded that he didn't know, they would see on October 7 (the date of the election). McCollum responded "okay" and that was the extent of the conversation.

Although Respondent doesn't deny this interchange, it hardly rises to the level of interrogation within the meaning of Section 8(a)(1) of the Act. Suffice it to say, Davis's pro-union sentiments were no secret. McCollum was not seeking information, although

Davis, as he is prone to do, attempted to color his testimony to that effect. There is no evidence that Davis disseminated this interchange. I recommend dismissal of the allegation in paragraph 9(e) as it relates to McCollum. See *Rossmore House*, 269 NLRB 1176.

No evidence was presented to support the allegation that Dick Locklear interrogated employees.

Gary Adkins, is alleged to have engaged in conduct violative of Section 8(a)(1) of the Act, in several other paragraphs in addition to paragraph 9(e). In paragraph 9(i) he is alleged to have promised employees additional benefits to discourage union activities. In paragraph 9(j), which was amended in at the hearing,

he is alleged to have threatened employees with discharge because of their union activities. In paragraph 9(o), he is alleged to have threatened employees with plant closure. In paragraph 9(t), it is alleged that Adkins informed an employee that he was terminated because of his union activities. In paragraph 9(n), Adkins is alleged to have threatened employees with loss of jobs because of their union activities.

In view of the fact that Alfreda Hammond, is the sole witness who testified regarding conversations by Adkins, it seems appropriate to discuss his conduct at this point.

Hammond, an alleged discriminatee, testified that on the night before the election, she was standing

across the street from the plant with some union representatives. According to her testimony, Adkins came outside the plant and hollered at the Union representatives that they didn't have any business across the street handing out papers. Allegedly, Adkins stated they were standing on House of Raeford property. She further testified that there was profanity going back and forth across the street that night. According to Hammond, on the night of the election, immediately after she voted, she met Adkins at the nurses station in the presence of nurses and several other people. Hammond testified that Adkins said she had heard that she had voted for the Union and he asked her if she was the individual across the street the night before.

She allegedly responded affirmatively. She testified further, that Adkins escorted her outside to the gate and said he was going to make sure that those sons of bitches did not come into the plant, and that he meant the Union people. According to Hammond, Adkins said to her he would make sure that "my black ass" would not get back into the House of Raeford, and he told the security guard not to let her back in.

Adkins testified that on the night of the election when he encountered Hammond at the nurses' station, she asked if he would buy a case of beer, and he responded that he had never brought a case of beer in his life.

Adkins specifically denied telling Hammond he would make sure that those sons-of-bitches would not come into the plant, and that he would make sure that Hammond's "black ass" would not get back in the House of Raeford. He further denied stating that he had heard she had voted for the Union. Adkins did ask the guard not to let Hammond back on the property, as she had been terminated prior thereto. Richardson, who works at the first aid station testified that she did not hear the term "black" ass used. She testified that Adkins told Hammond that if the Union got in or not, she, Hammond, had no business being there, because she no longer worked there and she had to leave.

Adkins' verbatim account of the conversation is as follows:

> "So, I go back in there and I ask her, I say Alfreda, I said are you the lady that I was talking to last night across the street, and she said yes. I said well, you don't work here no more do you. She said no. I said what are you doing in here. She said I'm waiting on one of my riders. I said well, you're going to wait outside the plant because you don't work here to start with, and if something was to happen to you inside the plant you could sue us. I said you're going to have to leave. She gets mad and says hell, you're just mad because the Union's wanting to come in here. I said lady, I ain't got nothing to do with the Union. I cannot stop them from coming in here, but I can stop you from being in here.

The credibility of Hammond has been discussed. She consistently attempted to embroil Respondent in discussions regarding the Union, and

when this failed, she contrived evidence. Adkins, who was corroborated by Richardson, impressed me as very credible. He didn't exaggerate or embroider. I believe he testified in accordance with what actually was said.

What Adkins told Hammond were facts. After Hammond voted she sat at the plant for some five hours. Adkins had a right to tell her to leave, and a further right to suggest that he would not rehire her. There is no nexus with her union activity.

I recommend that the allegations relating to Gary Adkins, in paragraphs 9(d), (i), (j), (o), (p) and (n), of the complaint be dismissed. I further recommend that paragraph 9(e) be dismissed in its entirety.

Paragraph (f)

Paragraph 9(f) of the complaint alleges that on August 4, supervisor Ralph Allen and Richard Ferguson, interrogated employees concerning their involvement in protected concerted activities.

Michael Washington, an alleged discriminatee, testified in support of these allegations. According to Washington he came back from the walkout on August 4, and was called to the scale house office by Ralph Allen. He testified that Ms. Betsy (Bessie Willis) and Richard Ferguson were present during his conversation with Allen. Allen allegedly asked Washington if he saw his picture in the newspaper with Johnson, and Washington responded affirmatively. He testified further

that Allen asked him if his wife came back and again he responded in the affirmative. Allen allegedly then asked him whether he had a brand new mobil home to pay for, and how many bedrooms it had. Washington replied it had two bedrooms. He then testified that he was asked by Allen why he went on strike and he responded he was trying to help the people. Allen allegedly stated he didn't see why he went out on strike because he was making $6.00 an hour. Washington conceded that Allen didn't ask him whether he was for the Union, threaten him, tell him he should have refrained from the walkout, or say that his job was in danger. Washington did not testify that either Willis or Ferguson

made any statements during the alleged meeting.

Allen, Ferguson and Willis, a secretary, specifically and emphatically denied Washington's testimony. They all denied that the conversation ever took place. Willis testified "as far as I'm concerned that meeting didn't take place. We didn't have a meeting with him (Washington)."

I have fully discussed Washington's credibility in the section dealing with his discharge. He is equally incredible in describing this meeting, and in my opinion fabricated his testimony.

Allen, Ferguson and Willis in my opinion were honest, unbiased witnesses. They did not demonstrate any antagonism towards Washington. Their

manner, in my view, was objective and direct. I fully credit them.

Accordingly I recommend that the allegations in paragraph 9(f) of the complaint be dismissed in their entirety.

Paragraph 9(g)

Paragraph 9(g) of the complaint alleges that employees were threatened and prohibited from wearing union insignia in the plant. The following named individuals are alleged to have engaged in the threats to prohibit, and the actual prohibitions:

Marvin Johnson
Sherwood Locklear
Dick Locklear
Jimmy Burns
Ralph Allen
Athens Barnes
Don Brewer

Apparently the testimony of Heywood Davis relates to the allegation

as it applies to Johnson. Davis testified that on October 7, as he was leaving the building where the voting took place, Johnson made the comment, there's another on (sic) of union "sons-of-bitches" or "mother fuckers." Davis testified that he had on a union shirt at the time. Johnson denied the conversation in its entirety.

Davis' credibility has been fully discussed. I believed Johnson, that the conversation did not occur and I credit him. Even assuming arguendo that the conversation did occur, there is no testimony by Davis that he was told to remove his union shirt or that he could not wear the shirt. Moreover I note that at the time, Davis was not even employed at the Respondent's plant. Accordingly I would dismiss

the allegation in paragraph 9(g) as it relates to Johnson.

No evidence was adduced to support the allegation as it relates to Sherwood Locklear.

Michael Washington testified that he wore a union sunvisor to work on more than one occasion, but on one occasion Dick Locklear told him that he could not wear the sunvisor and to get a hardhat. Washington testified that he removed the union visor.

Mae Helen Daniel testified that she wore a union button to work about a week after the walkout. According to her testimony Dick Locklear told her she could not wear the button until the election. She testified that she removed the button and approximately one week later, she re-

ceived some union hats and wore one to work. She testified that she passed out the hats to other employees and that Dick Locklear told her she could not wear the union hat.

Locklear denied both telling Washington that he had to take off the sunvisor or that he told Daniel that she had to remove a union button or pin. He conceded that he told Washington who was wearing the sunvisor in an edible product zone that he needed to put a hardhat on or a bump hat over it and a hairnet over that. Locklear explained the baseball hat had to be covered with a hairnet in an edible product zone which is a zone where the birds have been dressed, including anything from the eviscerating department forward. Locklear testified

further that he told Daniel she had to wear a hairnet over the union visor.

I fully credit the testimony of Dick Locklear, who was not even employed by the Respondent at the time he testified. I discredit both Washington and Daniel. I have discussed their credibility in some detail earlier. Locklear impressed me as an objective, honest and neutral witness.

He explained to Washington that hard hats and nets must be worn in edible product zones. Locklear admitted engaging in discussions with Daniel about a union hat but denied telling her to remove a union button.

Suffice it to say, Tomes of documentary evidence have been received into the record, including regulations issued by the United States Department

of Agriculture's Food, Safety and Inspection Service.

The government's directives address employee cleanliness, dress, personal hygiene and safety. Their sanitation policies and requirements are vast and highly detailed. They literally cover employees' dress and ornamentation from head to toe.

Respondent concedes that various departmental supervisors, from time to time, may deviate in the enforcement of these rules. I find no evidence of disparate treatment between pro-union or anti-union advocates. Moreover, I am convinced that Respondent historically has attempted to abide by these rules. The Union's organizational campaign, in my opinion, had no part

in the implementation or enforcing the regulations.

I recommend that the allegation in paragraph 9(g) of the complaint as it relates to Dick Locklear be dismissed.

No evidence was presented to support the allegation as it relates to Jimmy Burns. Accordingly I recommend that the allegation be dismissed.

Darlene Washington, Michael Washington's wife, testified that on October 6, he wrote on her apron "its union time" and worked in the apron from 12:00 until the end of the work day. She testified that before work on the next day, Allen saw her and told her she couldn't work with the magic marker on her apron and further, that they had stopped employees from

writing slogans on their aprons. Washington testified further that Allen told her to get another apron. According to her testimony, she had seen astrological signs and playboy bunnies on the aprons of employees, prior to this incident. She also testified that after this conversation she had seen people writing on their aprons. Moreover, according to Washington, the aprons are worn three to four days and then thrown away.

In her testimony she testified that she had written on her apron subsequent to the conversation with Ralph Allen. According to Washington no managerial employee told her she could not write on her apron since the conversation occurred. She did testify however, that she had written only

her name and clock number on her apron since the alleged conversation. Moreover, she conceded that she had worn a union tee-shirt and a union visor prior to the election, and no one had ever told her to remove them.

Allen testified that "union time" was written in magic marker all over the front of Washington's apron. According to Allen, Washington handled turkey giblets and livers, and the United States Department of Agriculture would not allow ink on an employee's uniform because it could get on the turkey product. Allen told Washington to get another apron and that was the end of the conversation. He acknowledged that previously, employees had different things drawn on their aprons but that Dick Locklear

had the employees buy new aprons and throw the old ones away. After that time, employees were only allowed to write their names and clock numbers on the aprons, near the neck of the apron.

Respondent is justified in enforcing United States Department of Agriculture regulations. The Board has decided in a legion of cases that enforcing rules as to hygiene and cleanness is justified in this type of industry.

Accordingly, I recommend dismissal of this allegation as it relates to Ralph Allen.

No testimony was adduced to support the allegation as it relates to Athens Barnes. Accordingly I recommend dismissal of said allegation.

Don Brewer, is alleged to be the quality control manager of Respondent's plant. As such, he issues memoranda to various management personnel and/or employees. They often relate to USDA and North Carolina Department of Agriculture Regulations.

Neither the testimony or the memoranda in evidence, indicate any conduct on the part of Brewer which is violative of Section 8(a)(1) of the Act. I recommend that paragraph 9(g) be dismissed in its entirety.

Paragraph 9(h)

Paragraph 9(h) alleges that Erick Wowra and Benita McNeill engaged in surveillance of employees' union activities.

The name "Benita McNeill" should be corrected to read "Bernita McNeill

Heard." I have heretofore discussed the allegations relating to Wowra and Heard. Their credibility has been addressed prior hereto. I credit them and conclude that they neither engaged in, or created the impression of surveillance. Heywood Davis' credibility has also been discussed, and I have found him to be a witness unworthy of crediting. Accordingly I recommend dismissal of Section 9(h) of the complaint in its entirety.

Paragraph 9(i)

Paragraph 9(i) of the complaint alleges that Johnson, Wowra, Adkins and Erick McPhatter promised employees additional benefits to discourage their union activities.

Respondent concedes that it solicited grievances, pledged to correct

problems, and in fact made good on some of its promises. The back ground evidence adduced by Respondent is essentially undisputed.

Between July of 1985, to February 1986, Wowra worked for Respondent as its general manager. Respondent did not feel that he fit into this position, so Wowra was terminated.

Thereafter, he worked at a pork processing cooperative in Pennsylvania as general manager, and at a unionized facility in Oakland, Iowa, as general manager for over a year. The Iowa facility employed approximately 1,300 employees.

In March or April, 1988, Brenda Branch, Food Service and Deli Sales Manager, called Wowra and told him that Johnson wanted to talk to him.

She asked Wowra if he would be interested in coming back to the plant. Wowra talked to Johnson and returned to the plant as personnel director. This was approximately two months before the walkout.

In the spring of 1988, Johnson felt that "things weren't right in the plant." The turnover at the plant was too high, at that time, 250%.[14] When Wowra returned to the plant, he met with Johnson to discuss what functions he would perform.

Johnson told Wowra he wanted him to find out why the absenteeism and turnover rate were so high. In addition, he was concerned with the safety program, plant crewing, and the large

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[14] In 1989, turnover went down to 150%.

number of employees requesting to borrow money. Johnson suggested the possibility of starting a credit union and possibly putting $10,000 in the bank, so the people could borrow money and when paid back it would remain in the credit union.

Wowra immediately commenced spending his days on the plant floor talking to the over 1,000 employees. Furthermore, he attended employee group meetings with Lou Lucente, General Manager. Lou Lucente, who had been hired shortly before Wowra, instituted a suggestion box and group meetings were attended by employees to discuss problems.

Documentary evidence reflects that meetings were held in July 1988, where grievances were solicited. On

July 19, Lucente, Wowra and Don Brewer, quality control manager, met with employees to discuss problems. The evidence reflects that employees claimed that supervisors tore up doctor's notes, weren't sensitive to problems, showed favoritism, dated subordinates, gossiped about the employees problems, refused to transfer important telephone calls, used profanity, fired employees on the spot, made sexists remarks, and failed to train new employees. Other complaints were that the management employed too many family members, fired a boyfriend if female employees wouldn't "cooperate." Employees also complained about various policies and plant rules, including lack of notice of Saturday work, holiday pay policies, health

excuse policies, vacation policies, and the bathroom policy. Further, employees indicated that their classifications and pay rates needed to be updated and a raise was needed.

Testimony by Wowra and documentary evidence reflect that he commenced investigating various employee benefit plans. On July 14, Wowra met with William P. Stanley, Jr., senior vice president and consultant of W. E. Stanley Company Inc., a Greensboro, North Carolina Company. Wowra and Stanley discussed various types of retirement plans, including a 401K plan.

In mid July, Wowra prepared a document which he entitled "challenge 1988--1989," which is in evidence. The document set forth Wowra's plans

and goals wherein he made specific suggestions on how to accomplish these goals. The document reflects that the goals are to reduce plant crewing, improve productivity, reduce processing cost, improve management/supervisory effectiveness, install management/supervisory incentive program, increase labor salaries, and improve employee morale and reduce turnover. Wowra advised that Respondent start an active safety program, recognize long term employees, restart the monthly newspaper, investigate and install a pension plan, increase formal and informal training, continue to upgrade the plant appearance, install a management incentive plan, investigate hourly wage increases, develop a strong professional management team,

initiate an employee of the month program, investigate a daycare program for employees' children, and have management picnics.

The agenda was typed on July 26, and presented by Wowra to Johnson on that day. Later Wowra sat down with Johnson to discuss the agenda. Johnson asked some questions, and Wowra made additional hand written notes to the document. Johnson asked how the employee meetings were going and whether or not they should be continued. Wowra told Johnson that he wasn't sure about the value of the meetings, he would get back to him about that. He told Johnson that they ought to analyze the suggestion box. They discussed the situation with respect to employees constantly asking for

advances on their paychecks, and Johnson brought up the possibility of setting up a $10,000 account for such loans. Wowra did not want to manage such an account and suggested that perhaps the money should be put in a credit union. They also discussed the possibility of sending management to a North Carolina State football game, and installing a 401K plan, a physician's health plan and a retirement plan.

On July 28, two days later, the first walkout of four employees occurred. On August 1, the following Monday, the employees walked out en masse. Thereafter, the following week, Respondent commenced meeting with employees to discuss their problems.

During the first set of meetings, Johnson solicited employees to discuss grievances and problems, and he made some changes, and pledged to investigate other problems.

During the fourth meeting, Wowra told the employees that he was in the process of implementing programs and correcting problems when the walkout occurred, and that he desired to continue to do what he had been hired to do. Furthermore, Branch and Johnson told the employees that now that they had gotten their attention they wanted a chance to continue what they had begun.

Conclusion and Analysis

Respondent's actions were unrelated to any union activity. This is obvious because Wowra was hired ap-

proximately 2 and 1/2 months before any union activity, for the very purpose of analyzing, rectifying, and adjusting employee problems.

Respondent's conduct was motivated by legitimate business reasons before and after the advent of any union activity. Moreover, on August 1, a mass walkout occurred. This was certainly a graphic illustration that the employees were dissatisfied and had problems. Respondent was more than justified in finding out what those problems were and curing them. Nor is an employer precluded from continuing, without interruption, conduct it had embarked upon months before. See *Clark Equipment Co.* 278 NLRB 498 and *Daniel Construction Co.* 264 NLRB 569.

Alfreda Hammond's testimony makes no reference to Gary Adkins' promising additional benefits to discourage union activity. According to Adkins' testimony, Hammond asked him to buy a case of beer. He refused, telling her he had never done that before in his life.

Annie Hardy testified that around the latter part of August, or the 1st of September, she was reading a Notice of Election posted above the timeclock and Erick McPhatter, supervisor of packing, asked her what she thought. She testified further that McPhatter told her to let him tell her what to think, and that Hardy should think that they did not need a union, because all a union would do is take their money, and if a union was voted

in, "all Marvin's (Johnson) going to do is close the plant." Hardy testified that McPhatter said "he had promised a raise Labor Day," "we got him where we want him and if Marvin had did what his lawyer had told him to do, it would not have come to all this, and that anything we ask him from now on, we would get it." Hardy testified that she stated "let him close it," and she walked away. She also testified that no one else was present during this alleged conversation.

McPhatter readily acknowledged that he spoke individually with employees with reference to his opinion regarding the Union, and in his opinion he did not think that they needed a union, because all a union could do

was take their money. He did not specifically recall discussing the union with Hardy and denied ever telling her "let me tell you what you should think," or that if a union was voted in Johnson would close that plant. He also specifically denied having told Hardy that "they" had Johnson where they wanted him, and that they would get anything they wanted in the future. McPhatter denied making any of the statements which Hardy alleged him to have made.

McPhatter was an extremely credible witness. He made a sincere effort to recount accurately. He did not attempt to equivocate. Accordingly, I fully credit his testimony.

Contrarily, Hardy focused on complete fabrication. If in fact,

McPhatter told her his opinion, she proceeded to falsely embellish and distort the alleged conversation. McPhatter acknowledged on cross examination that he spoke to 40 or 50 employees, rendering his opinion. Hardy was a single witness. Where were the others? I completely discredit Hardy's testimony.

I recommend that the allegations appearing in paragraph 9(i) of the complaint be dismissed in their entirety.

Paragraph 9(j)

Paragraph 9(j) alleges that the following individuals threatened employees with discharge because of their union activities:

Marvin Johnson
Roscoe McCollum
Lizzie Mae Harris

Gary Adkins[15]
Annie Gilchrist
Constella McLeod
Erick Wowra

The allegation relating to Johnson, allegedly occurring on August 15, has been fully discussed in Section 9(d) of this decision.

Suffice it to say, that a number of employees testified that Wowra, Johnson and Branch made flagrantly unlawful comments, threatening discharge and plant closure because of union activity. These allegations surfaced as the result of group meetings.

Wowra conducted a series of meetings during the organizational campaign. Approximately 50 employees attended each meeting, which were held

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[15] Adkins was amended in at the hearing.

in the quality control lab. The large size work force necessitated repeating each meeting 20 times.

In each of the meetings, Wowra employed notes which were received into evidence. In the beginning, he paraphrased from the notes. As time went on, he became familiar enough with the text to use the notes as a guide.

During the first meeting, Wowra told the employees about the meetings to be held, and stressed the importance of the employees decision. He utilized a video tape which showed employees arguing for, and against, unionization and emphasizing how the Union could not deliver with respect to promises made. He also discussed collective bargaining and what would

happen if the Union came into the plant. He told the assembled employees that Respondent's only obligation was to bargain in good faith, and that it did not have to agree to any of the Union's demands. He stated that everything goes to the bargaining table and four things could happen. They could come out better off than when they when they went in, they could come out with a contract that was the same as what they had, except they would be paying union dues, they could come out with less wages and benefits than they already enjoyed, or they could come out with no agreement. He also discussed unionization in general, and informed the employees with respect to dues, fees and fines, loss

of personal freedom, union rules and the possibility of strikes.

The second series of meetings were also conducted by Wowra. The general subject was the financial reports, LN-2 reports, and he highlighted them. He discussed the financial reports of the local union and the financial reports of the International, in Washington, DC. He also discussed the Union's constitution.

Wowra and Branch both conducted the third series of meetings. The general topic during these meetings was job security. Wowra spoke first, telling the employees that unions do not create job security, but that the employees as individuals create their own job security by doing the best that they can following the rules, and

making a quality product that will result in repeat sales. He also discussed the importance of voting and that it was important to vote, "don't just not vote." He specifically testified that he never said the plant would close if the Union came in. What he did say, was that any plant can close due to unfavorable economic conditions, poor marketing, poor quality product, and poor perception of a product. He told the employees that the Union is not a customer, that the customer causes repeat sales and allows people to stay in business. He also testified that if a union interfered in delivering a product, it lost jobs, and if it became uncompetitive because of unreasonable demands, it lost jobs. He showed employees a film

concerning Tyson Foods where the Union passed out handbills accusing the Company of operating under unsanitary conditions. Wowra also informed the employees about his experiences running a beef processing plant in Oakland, Iowa.

Brenda Branch testified that she spoke after Wowra from notes she had made a few days before the meeting. Branch utilized the notes for the first meeting or two. She testified she used them a little more than she did after the first couple of meetings and then memorized them. Branch testified further that she did not attempt to ad lib because she is not very good at ad libbing. Moreover she testified that she followed pretty much the notes which are in evidence,

word for word. She spoke about job security, and told the employees that union or no union, the plant had to earn a profit to remain in existence and for all of the employees including herself to have job security. She further explained that the Union could not provide job security and could actually damage security if they spread malicious lies to customers. She discussed Tyson Foods and stressed that Food Lion was a major customer, and that the Union had been threatening to boycott Food Lion. Her notes and testimony reflect that she stated that Marvin Johnson doesn't want to shut the plant down, he wants it to operate and be a success, but that if for any reason it didn't make good business sense to operate, he could

and would shut it down. She also told the employees that if a company is forced, due to economic business conditions to cut back on its work force it would do that. Moreover, if the company was forced to close down because it couldn't make a reasonable profit, or because a strike shut it down and it lost its customers, than it would have to go out of business. Furthermore, according to Branch, she advised the employees that there was no law and no union contract that says the company cannot do what it must do.

The fourth series of meetings were conducted by Wowra, and his notes are in evidence. He discussed strikes and bargaining. He showed a film of a strike at a Hormel plant in Minnesota. He also discussed a strike at Golden

Poultry. He addressed a newspaper clipping wherein the Union representative involved in organizing Respondent's plant is quoted.

The final series of meetings was held on October 4 and 5. Wowra, Branch and Johnson spoke.

Wowra spoke first, telling the employees that he wasn't hired to spend 12 and 14 hour days educating the employees about the Union. Rather, he was hired to implement positive programs to improve operations and benefits. He asked for a chance to do what he was hired for. He explained the voting procedure. He addressed collective bargaining, stating that Respondent had to bargain in good faith but it did not have to agree to demands.

Branch, again used notes when she spoke. Again she followed the notes almost word for word and did not ad lib. She, *inter alia*, asked employees to vote no. She informed the employees that they had gotten Respondent's attention, Respondent had commenced to solve problems, but it takes time.

Branch had prepared notes, which are in evidence, for Johnson, who spoke next. He told the employees that he didn't think they needed a union. Respondent did not have a big Board of Directors, and most of them knew him by his first name. Moreover, a lot of them came to him to borrow money. He further testified that they come to him to discuss problems and they didn't need a third party diddling around. He told the employees

that the Respondent wasn't a welfare department, raises came from profits. Johnson testified further, that he told employees if the supervisors did not treat them right, the supervisors would be fired. Furthermore, he told the employees that he was already taking more out of their paychecks than he wanted, and he didn't see any need for them to vote in a union so he would have to take more out of their checks. He mentioned the Union Flyer that said he had made $9,000,000. Johnson informed the employees that this was not true, some years he made money, and other years he lost money. He further informed the employees that making a profit was necessary to stay in business. He told them he did not have any respect for the Union and he

didn't like them and they could not tell him how to run his plant. According to Johnson he stated that he would not be intimidated by a strike and he was going to run turkeys with or without them. Moreover, if a strike occurred, he would hire replacements or run the turkeys somewhere else. Johnson showed the employees a ballot and asked the employees to vote "no." He told them that they were either "with me or against me," and if they lined up with the Union, "the fight has just begun." He asked the employees to line up with him and vote "no."

The testimony of the General Counsel's witnesses was vacuous and fragmentary. I'm convinced that most of the witnesses other than the obvi-

ous prevaricators, heard what they wanted to hear, I discussed the credibility of Carl Lindsey and Annie Hardy in paragraphs 9(d) and (i). Neither had any regard for the truth. None of the employees made any notes of the meetings. I believe that in general most of these witnesses were intelligent people. I recognize that they are not sophisticated labor lawyers enabling them to distinguish nuances. The layman cannot be expected to recognize the incompatibility between "would" and "could."

I am convinced that Respondent's management, who denied the unlawful remarks attributed to them, Wowra and Johnson, did not threaten to discharge employees because of their union activities. Wowra certainly isn't unfa-

miliar to unions, nor is Johnson wet behind the ears in this regard. They utilized notes. When they deviated from their notes, I am convinced they did not cross over the line into illegality. The same can be said for Branch, who I believe did not ad lib. I conclude that the speeches made by Johnson, Wowra and Branch were protected under the free speech provisions of Section 8(c) of the Act.

Carl Lindsey testified that approximately a week after a meeting held by Wowra, he met with Roscoe McCollum in McCollum's office. According to Lindsey's testimony, McCollum told him that he could not go to anymore company meetings and McCollum asked Lindsey whether he thought the Union was going to get in.

Lindsey testified that it was going like a freight train non stop. He further testified that McCollum said "well, he can't go to the meetings now and you know what is going to come next." According to Lindsey he asked McCollum what he meant and McCollum responded "life was a bitch just watch your step."

Respondent concedes that Lindsey was told he would not be permitted to attend any of the company meetings where the Union was discussed. Wowra testified that some of the employees, including Lindsey, were disruptive during the meetings and he was unable to conduct the meetings. Therefore Wowra prepared a list of the disruptive employees and instructed the

plant manager to exclude them, including Lindsey, from the meetings.

McCollum's statements were vague, ambiguous, and did not contain an implied threat to discharge Lindsey. Lindsey doesn't even suggest in his testimony that there was any reference made to his union activity. Accordingly, I recommend dismissal of this allegation in paragraph 9(j) of the complaint as it relates to McCollum.

No evidence was presented to support the allegation relating to Lissie Mae Harris. Accordingly I recommend that the allegation relating to Harris be dismissed.

The allegation relating to Gary Adkins has already been discussed in the Section paragraph 9(e).

Annie Gilchrist, was a supervisor in the cutup and packing department. Krista McNeill testified that while working in the packing department the day before the election, Gilchrist called her to the side and told her that she heard that if the Union came in, they were going to close the plant and that she (Gilchrist) needed her job. That was the extent of the conversation.

Patricia Williams testified that on the day before the election Gilchrist called her off of the dark meat table, and told her that she "better vote no." Williams testified she asked Gilchrist why, and Gilchrist responded "because I heard that the Plant was going to close down and I needed my job." She testified further

that she responded "I come looking and I leave looking."

Martha Williams testified that on the day before the election Gilchrist called her over and said "you need to vote no," and Williams asked Gilchrist why. Gilchrist responded that it was "because the Union will get in here and we may not have no job." That was the extent of that conversation.

Cathlene Davis Testified that she had been confused about voting, and on the day before the election, she had a conversation with Gilchrist between the door and the parking lot. Davis testified that Gilchrist told her she heard that she was confused about the election, and that if they did not vote for the House of Raeford, "we

won't have no job when we come back in."

Gilchrist testified that she had one on one conversations about the Union with approximately eight to ten employees including those named above. She testified further that she said the same thing to each of them. Gilchrist related that she said "I'm not asking you how you plan to vote." She then told the employees "I need my job and if the Union come, we both might be out of a job." When she was asked how long these conversations lasted, she testified "it wasn't even a minute, ---." The transcript should be corrected at page 1345 to correct the word "was" to "wasn't." The witness testified using the word "wasn't."

I have no doubt that Gilchrist was expressing her personal opinion. It is also noted that Gilchrist, in her testimony used the word "might," and I credit her. there is no evidence that Gilchrist remarks were communicated by employees to other employees. The conversation occurred in the work area, not in an office. Moreover, Gilchrist did not represent that she was speaking on behalf of Respondent. I recommend dismissal of the allegation relating to Gilchrist in paragraph 9(j) of the complaint.

Costella McLeod testified that she considers herself a group leader. Respondent denies her supervisory status.

Mcleod is hourly paid and punches a time clock. She records individuals

who arrive late to the line. She has no authority to warn these employees. She and another employee set up the table, and turn on the belt and the water. She sees that the employees at the table are aware of their positions. She hands out knives and bags to employees. She makes no product decisions regarding what is to be run on a particular day. McLeod exercises no independent judgement, but rather performs routine ministerial functions. She intercedes when employees have problems, but she has no authority to discipline them. She voted in the election without challenge. McNeill testified that McLeod's coat was different from that of other employees, but she wasn't furnished the coat until November 1988, after the elec-

tion. I conclude that McLeod is not a supervisor within the meaning of Section 2(11) of the Act.

Moreover, in my opinion the alleged remarks attributed to McLeod, do not constitute violations of Section 8(a)(1) of the Act.

Krista McNeill testified that McLeod told her, Charlene Ray and Patricia Williams, prior to the election that she heard Johnson say he was going to get rid of all the trouble makers who started the strike and wore union sun visors. She also testified that on the Monday after the election, McLeod told the same employees that she heard Johnson pays people to vote against the Union, and he was going to get rid of all the trouble makers.

No testimony was adduced from Ray or Williams regarding the alleged conversations.

McNeill also testified that McLeod stated that she did not care how anyone voted, because she would get what ever anyone else got. Williams testified that McLeod told her "she didn't give a shit how the employees vote."

McLeod testified that the women were discussing what they knew about the Union, and she specifically denied saying she heard that Johnson said he was going to get rid of the trouble makers or the people who wore union sun visors. Additionally McLeod testified that McNeill, Ray and Williams told her they heard Johnson say he was going to get rid of the trouble mak-

ers. McLeod responded "I heard that too." She also testified that one of the employees said she heard that Johnson paid people to vote against the Union, and McLeod responded "I heard that too."

I credit McLeod's version of the conversation. I discredit McNeill, because I believe that she took plain gossip and falsely attributed the remarks to McLeod. I believe that McLeod did nothing more than agree that she heard the rumors. She did not make any comments binding Respondent. Furthermore, McNeill and Williams acknowledged that Mcleod didn't care about the Union one way or another. Interestingly my notes, made during her testimony, reflect that she impressed me as an individual who

couldn't have cared less about the Union.

Accordingly I recommend that the Section in paragraph 9(j) of the complaint relating to McLeod be dismissed, and furthermore that paragraph 9(j) be dismissed in its entirety.

Paragraph 9(k)

This paragraph was fully discussed in the Section of this decision captioned paragraph 9(i). I recommend that paragraph 9(k) be dismissed.

Paragraph 9(l)

The paragraph of the complaint was fully discussed in Section 9(i). I recommend that paragraph 9(l) be dismissed.

Paragraph 9(m)

This paragraph of the complaint was fully discussed in Section 9(j) of this decision. I recommend that paragraph 9(m) be dismissed.

Paragraph 9(n)

This paragraph as it relates to Gary Adkins, was fully discussed in Section paragraph 9(e) of this decision.

This paragraph as it relates to Mr. Hippotemus was withdrawn at the hearing.

This paragraph as it relates to Annie Gilchrist, was fully discussed in Section paragraph 9(j) of this decision. I recommend that paragraph 9(n) be dismissed.

Paragraph 9(o)

No evidence was presented relating to James "Tightrope."

The allegation in this paragraph as it relates to Erick Wowra has been discussed in Section paragraph 9(j).

The allegation as it relates to Marvin Johnson has been fully discussed in paragraphs Section 9(d) and (j) of this decision.

The allegation as it relates to Gary Adkins has been discussed in Section paragraph 9(e) of this decision.

No evidence was presented relating to the allegation involving Terrel Hines.

Ethel Lee Melvin testified in support Of the allegation as it relates to McCollum. She testified,

that on the night of the election, McCollum put his arms around her neck and told her "she better vote for the Union, no--because Marvin Johnson is getting ready to close the damn plant." Melvin testified that she told McCollum "I don't give a dam what Marvin do. I'm voting for the Union," and walked away. After Melvin voted, she testified that McCollum was standing at the side of the wall and said "you done did it?" and Melvin testified that she responded affirmatively.

McCollum testified that he did not speak with Melvin on the day of the election. He testified further he did not tell her how to vote or to vote, nor did he tell her that Johnson was getting ready to close the plant. Moreover, according to his testimony,

McCollum did not see Melvin after she voted and say "you done did it."

I fully credit McCollum, whose credibility I've discussed earlier. No other witnesses testified that McCollum engaged in this kind of conduct.

Counsel for Respondent called Melvin as his own witness. She was unable, or refused, to respond to any of the details of the group meetings. She testified over and over that she slept throughout the meetings. Melvin was a world-class evasionist, whose testimony was pure fiction.

The allegation as it relates to Gilchrist has been discussed in paragraph 9(j) of this decision.

The allegations of this paragraph related to Eric McPhatter have been

fully discussed in section paragraph 9(i) of this decision.

The allegation in this paragraph of the complaint as it relates to Brenda Branch has been discussed in section paragraph 9(j) of the complaint.

Accordingly, I recommend dismissal of paragraph 9(o) of the complaint in its entirety.

Paragraph 9(p)

This allegation was fully discussed in the section caption paragraph 9(e). I recommend dismissal of paragraph 9(p).

Paragraph 9(q)

This paragraph has been fully discussed under the section addressing the discharge of Alfreda Hammond. Accordingly it is recommended that

paragraph 9(q) of the complaint be dismissed in its entirety.

Paragraph 9(r)

The allegation in this paragraph have been discussed in section paragraph 9(j). Accordingly I recommend dismissal of paragraph 9(r) of the complaint.

Paragraph 9(s)

Brendá Branch testified that she ordered approximately 1,000 "vote no" tee-shirts and gave them to Beatrice McCrae, the supply room clerk to distribute to employees.

McCrae testified that as part of her normal duties she keeps all supplies which are distributed to the employees. She requires them to sign for any of such supplies in order to keep track of the inventory, and at

the end of the year she throws away the list.

Therefore, McCrae, as is consistent with her normal procedure, required the employees who asked for tee-shirts to sign a list. Management gave her no instructions to keep such a list. There is no evidence that management was even aware of the list. According to the testimony of McCrae, two employees, Monroe and Ware saw the list because they helped pass out the shirts.

McCrae decided not to give "vote no" tee-shirts to employees who were wearing pro-union tee-shirts. Therefore, several employees were denied shirts. Branch testified she was unaware of this until she received complaints from several employees.

Thereupon, she called McCrae and asked why she was not giving tee-shirts to these employees. McCrae responded that she didn't feel that someone who was wearing a union tee-shirt should get a "vote no" shirt. Branch informed Johnson of the situation and he agreed with McCrae that the employees had to be one way or the other.

There is no evidence that the list was utilized for polling purposes. The employees with pro-union shirts were literally showing their sentiments on their chest. The list was simply for the purpose of keeping track of inventory. No employees were coerced or pressured into wearing the "vote no" shirts. Accordingly, I recommend that this allegation in

paragraph 9(s) of the complaint be dismissed.

paragraph 9(t)

This allegation was withdrawn at the hearing.

Paragraph 9(u)

Apparently this allegation references Johnson's statement that he was going to run turkeys with the employees or without them, and if there is a strike, he will either hire replacements or run the turkeys someplace else. There was no nexus between running the turkeys at another location and the Union. Johnson was talking in the context of a strike occurring and the fact that he could hire replacements or run the turkeys elsewhere. By these remarks he was merely stating what an employer is privileged

and has the right to do, during the course of an economic strike. Accordingly his remarks were lawful. See *M-B Company* 290 NLRB No. 11.

Accordingly I recommend that this allegation appearing in paragraph 9(u) of the complaint be dismissed.

Paragraph 9(v)

This allegation was withdrawn at the hearing.

Paragraph 9(w)

This allegation was withdrawn at the hearing.

Paragraph 9(x)

The allegation appearing as paragraph 9(x) was an additional paragraph which was amended in, at the hearing.

This paragraph alleges that Respondent maintained an unlawful no solicitation/distribution rule.

Until July 11, 1989, Respondent maintained in its guidebook for its employees at page 10, a no solicitation rule prohibiting all solicitations not approved by management.

Although no evidence was adduced that the rule was ever enforced against employees, Respondent concedes that the rule is presumptively invalid.

On July 11, 1989, Respondent specifically revoked the rule and implemented a new rule.[16] No purpose would be served at this juncture to remedy a technical violation which Respondent has already cured. It would not effectuate the purposes of

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[16] Received into evidence, which spelled out the prohibition on solicitation during working time. The new rule is not overly broad and is presumptively valid.

the Act. Accordingly, I recommend that paragraph 9(x) of the complaint be dismissed.

Charging Parties Separate Objection

In a separate objection, not alleged to be 8(a)(1) conduct, the Charging Party alleges that the election should be set aside by virtue of Respondent's objectionable conduct in its October 6, distribution of a pamphlet, "Diary of a Strike."

The pamphlet describes a plot line that might occur should the Union win the election. Different events appear on separate pages, and each page is dated. The pamphlet portrays an election where the Union wins by a few votes, "legal procedures," by both parties, certification after five months, negotiations for four months

and a strike. The pamphlet further delineates some possible consequences of a strike, including, *inter alia*, lost wages, property damage, loss of jobs and veiled threats.

The pamphlet must be considered in the context of the lengthy, hotly contested campaign, where both parties engaged in extensive campaign rhetoric. Moreover, in employee meetings, Wowra legally delineated the ramifications of the collective bargaining process and strikes. He neither expressed or implied that Respondent wouldn't bargain. To the contrary, he told the employees that an employer is obligated to bargain in good faith. Indeed, the pamphlet that issued, reflects on page four, a scenario where Respondent negotiates for four

months as of March 13, 1989, and on the next page, a strike vote was taken on July 10, 1989.

I cannot perceive anything in the pamphlet that even remotely suggests that a strike and resultant loss of jobs or security are inevitable.

Furthermore, job security was also stressed by management in the meetings. This was addressed in the context of customer satisfaction, a quality product and a fair price.

Respondent sites *Can-Tex Industries* 256 NLRB 863, where language did not communicate that strikes and job loss were inevitable. The language was found not to violate Section 8(a)(1)[17], and the text is simi-

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[17] Objections to an election were not the issue.

lar to the pamphlet at issue herein. The fact that the pages are dated in the pamphlet, in my opinion, does nothing to enhance the Charging Party's "inevitability" argument. In my view the dates are superfluous and are of no legal significance or consequence.

Counsel for the Charging Party relies on, among others, a recent case *Fred Wilkinson Associates* 297 NLRB No. 114. (Feb. 8, 1990) She asserts that the language at issue in that case, is "virtually identical," to the language in the pamphlet. I find *Wilkinson* inapposite. There, a letter was sent to employees containing language which convinced the employees that a strike was inevitable, as a means of obtaining concessions from

the Employer. The language of the letter stated in pertinent part, "as you have learned over the last weeks, the Union cannot guarantee that your wages and benefits will go up or even stay the same. The only thing the Union can guarantee is a strike. In fact, the only thing the Union can do to try to get the company to agree to its demands is to call a strike."

The Board in the *Wilkinson* case sites *Amerace Corporation*, 217 NLRB 850. The language in that case states in pertinent part "in arguing against unionism, an employer is free to discuss rationally the potency of strikes as a weapon and the effectiveness of the Union seeking to represent his employees. It is, however, a different matter when the Employer leads the

employees to believe that they must strike in order to get concessions. A major presupposition of the concept of collective bargaining is that minds can be changed by discussion,[18] and that skilled, rational, cogent argument can produce change about the necessity for striking--Employees should not be lead to believe, before voting that their choice is simply between no union and striking. The whole message to employees was to instill in them a fear of the adverse effect of collective bargaining, coupled with the admonition that the selection of the petitioner as their bargaining representative was excur-

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[18] Page four of the pamphlet herein illustrates that "discussion," (negotiations) continued for four months.

sion into complete futility."

I conclude that Respondent's pamphlet was within the permissible boundaries of free speech, within the meaning of Section 8(c) of the Act, and not objectionable.

Accordingly, I recommend that this separate objection, and the other objections discussed in the context of unfair labor practices in this decision, be overruled. I further recommend that the Board certify the results of the election.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

I conclude that Respondent's pamphlet was within the permissible boundaries of free speech, within the meaning of Section 8(c) of the Act, and not objectionable.

Accordingly, I recommend that this separate objection, and the other objections discussed in the context of unfair labor practices in this decision, be overruled. I further recommend that the Board certify the results of the election.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The allegations of the complaint that Respondent has engaged in conduct violative of Sections 8(a)(1), (3), and (4) of the Act have not been supported by substantial evidence.

4. The objections have not been supported by substantial evidence.

5. Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following:

ORDER[19]

It is recommended that the complaint herein be, and it hereby is,

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[19] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Supreme Court, U.S.
FILED
MAR 28 1994
OFFICE OF THE CLERK

No. 93-1163

In the Supreme Court of the United States

OCTOBER TERM, 1993

HOUSE OF RAEFORD FARMS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board reasonably concluded that petitioner's method of distributing "vote no" T-shirts during the union's election campaign tended to restrain employees in their choice of a collective-bargaining representative in violation of Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1).

2. Whether the Board reasonably concluded that a supervisor was speaking for management, and not expressing a purely personal opinion, when she told approximately ten employees that "we might both be out of a job" if the union won the election.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1163

HOUSE OF RAEFORD FARMS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4-43) and an order amending the opinion (Pet. App. 3) are unreported, but the judgment is noted at 7 F.3d 223 (Table). The decision and order of the National Labor Relations Board (Pet. App. 44-82) and the decision of the administrative law judge (Pet. App. 83-315) are reported at 308 N.L.R.B. 568.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1993. The court of appeals issued an order amending its opinion on October 6, 1993. A petition for

rehearing was denied on October 18, 1993. Pet. App. 1-2. The petition for a writ of certiorari was filed on January 14, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner employs approximately 1000 workers in the processing and sale of turkey and chicken products at a plant in Raeford, North Carolina. On August 2, 1988, the union[1] began an organizing campaign at the plant, and on August 15, 1988, it filed a representation petition with the National Labor Relations Board (Board). Pet. App. 11, 16, 18, 87, 89, 99. During the union campaign, petitioner provided Beatrice McCrae, the supply room clerk, with 1000 "vote no" T-shirts for distribution to employees. McCrae, with the approval of petitioner's president, denied T-shirts to employees who were wearing pro-union apparel, and compiled a list of employees who had received "vote no" T-shirts. *Id.* at 63-64. The day before the election, Annie Gilchrist (a supervisor in the cutup and packing department) held one-on-one conversations with eight to ten employees, in which she stated: "I'm not asking you how you plan to vote. I need my job and if the Union come [*sic*], we both might be out of a job." *Id.* at 28, 67.

2. After losing the election by a vote of 420 to 391, with 29 challenged ballots (Pet. App. 52 n.6), the union filed unfair labor practice charges. On February 28, 1989, the Board's General Counsel issued a consolidated complaint alleging that petitioner had violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1). Pet. App. 84-85. The complaint alleged, *inter*

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[1] Local 204, United Food and Commercial Workers Union.

alia, that the conduct of McCrae and Gilchrist was in violation of the Act. *Id.* at 286-289, 300-302.[2]

After a hearing, an administrative law judge (ALJ) dismissed the complaint. Pet. App. 314-315. The ALJ found that the list of employees who had received "vote no" T-shirts was used to keep track of supply room inventory rather than to poll employees respecting their union sentiments. *Id.* at 302. The ALJ also observed that no employees were in fact "coerced or pressured" into wearing the T-shirts. *Ibid.* In addition, the ALJ concluded that supervisor Gilchrist's comment was a permissible expression of personal opinion, since she had not represented to the employees with whom she spoke that she was speaking on behalf of management. *Id.* at 289.

The Board rejected the ALJ's findings and conclusions. Pet. App. 62-70.[3] The Board found that petitioner's method of distributing the "vote no" T-shirts violated Section 8(a)(1) because it reasonably tended to interfere with the employees' free choice of a collective-bargaining representative. Pet. App. 64-66. The Board observed that "employees were required to refrain from displaying support for the Union and sign a list acknowledging receipt of the T-shirt" in order to obtain one. *Id.* at 65. The Board explained that "[s]uch employer recordkeeping of the employee's antiunion sentiments enables [petitioner] to discern the leanings of employees, and to direct pressure at particular employees in its

[2] The union also filed objections to the election, which essentially tracked its unfair labor practice charges. Pet. App. 86 n.2.

[3] The Board agreed with the ALJ, however, that petitioner had not discharged certain employees for engaging in protected union activity. Pet. App. 46 n.3, 88-215. No issue respecting those discharges is presented here.

campaign efforts." *Ibid.* "Given the circumstances of this case," the Board concluded, "it would be reasonable for the employees to conclude that the recording of employees' names as they received the antiunion T-shirts was done for purposes other than merely monitoring supplies." *Ibid.*

The Board also found that supervisor Gilchrist's statements violated Section 8(a)(1) because they amounted to "implicit threats that the plant would close if the employees selected the Union as their bargaining representative." Pet. App. 67. The Board observed that Gilchrist's remarks "clearly conveyed to employees that they might be out of a job should the Union be voted in." *Id.* at 68. Moreover, the Board found that "nothing occurred in these conversations to indicate to employees that Gilchrist was speaking in other than her capacity as a supervisor for [petitioner]." *Ibid.* Gilchrist had initiated the conversations, which occurred in work areas, and she had not advised the employees with whom she spoke that she was simply expressing her personal opinion. *Id.* at 68-69. To remedy petitioner's unfair labor practices, the Board entered a cease-and-desist order and required petitioner to post an appropriate notice. *Id.* at 73-76.[4]

3. The court of appeals enforced the Board's order in relevant part. Pet. App. 3, 4-33.[5] The court observed that

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[4] The Board also concluded that a new election was warranted because of petitioner's unfair labor practices. Pet. App. 73, 76-80. That aspect of the Board's order was not before the court of appeals, see *NLRB* v. *Falk Corp.*, 308 U.S. 453, 459 (1940), and no issue respecting it is raised here.

[5] In addition to the unfair labor practices discussed above, the Board found that petitioner had violated Section 8(a)(1) of the Act by soliciting employee grievances and engaging in related conduct designed to discourage union activity. Pet. App. 47-62. The Board

"[i]n evaluating an employer's conduct under [S]ection 8(a)(1), the test is not whether the language or acts *were coercive in actual fact*, but whether the conduct in question had a *reasonable tendency* in the totality of the circumstances to intimidate." *Id.* at 25 (internal quotation marks omitted). Noting that the Board is "possessed of large discretion," *id.* at 22, the court of appeals held that, on the facts of this case, the Board had rationally concluded that petitioner's method of distributing the "vote no" T-shirts had a reasonable tendency to intimidate or coerce employees. *Id.* at 26. The court pointed out that McCrae's refusal to give a T-shirt to any employee wearing pro-union attire had caused pro-union employees to become more identifiable, that employees had complained to a supervisor about McCrae's practice, and that, by requiring employees to sign a list upon receipt of a T-shirt, the possibility of identifying pro-union employees was increased. *Id.* at 26-27.

The court of appeals also affirmed the Board's conclusion that supervisor Gilchrist's statements violated Section 8(a)(1). Pet. App. 32-33. It acknowledged that Gilchrist's remarks could plausibly be construed as mere expressions of personal opinion. *Id.* at 31-32. The court determined, however, that "[i]t seems an equally reasonable and fair conclusion of the NLRB that employees, often intimidated by or even respectful of supervisors, could interpret Gilchrist's remarks as the comments of a

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ordered petitioner to cease and desist from that conduct. *Id.* at 74. The court of appeals concluded, however, that this finding was not supported by substantial evidence, and it therefore declined to enforce that portion of the Board's order. *Id.* at 11-20. No issue respecting that aspect of the court of appeals' decision is presented here.

[c]ompany official, as opposed to the opinion of a concerned coworker." *Id.* at 30-31. Observing that "[t]he question is whether the statements had a 'reasonable tendency' under the circumstances to intimidate," the court noted that Gilchrist did not explicitly tell employees with whom she spoke that she was "giving her personal opinion or voicing her own fears"; that "[c]learly, the remarks conveyed the specter of layoffs in the event of a Union win"; and that the conversations took place during work hours in the work area and not, for example, in a social setting or during a lunch break. *Id.* at 29-30.[6]

Judge Wilkinson dissented. Pet. App. 33-43. In his view, the Board's unfair labor practice findings were "based on flawed presumptions rather than substantial evidence." *Id.* at 42.

ARGUMENT

1. Petitioner contends (Pet. 18) that the Board's determination regarding the distribution of "vote no" T-shirts represents an unwarranted expansion of Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1). In petitioner's view, the Board has proscribed conduct which is "neither threatening, intimidating, nor coercive, but which merely creates an 'opportunity', never acted upon, to engage in threatening, intimidating, or coercive conduct." Pet. 18. This contention is without merit.

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[6] Since Gilchrist's remarks had a reasonable tendency to intimidate employees under the circumstances presented, the court of appeals recognized that her statements did not fall within the protection of Section 8(c) of the Act, 29 U.S.C. 158(c), which provides: "The expressing of any views, argument, or opinion * * * shall not constitute or be evidence of an unfair labor practice * * * if such expression contains no threat of reprisal or force or promise of benefit." Pet. App. 29.

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7 of the Act.[7] As the Board explained, the inquiry under Section 8(a)(1) is an objective one. Pet. App. 66 n.12. The relevant question, as the court of appeals noted, is "not whether the langu ge or acts *were coercive in actual fact*, but whether the conduct in question had a *reasonable tendency* in the totality of the circumstances to intimidate." *Id.* at 25 (internal quotation marks omitted); accord *NLRB* v. *Marine Optical, Inc.*, 671 F.2d 11, 18 (1st Cir. 1982); *Weather Tamer, Inc.* v. *NLRB*, 676 F.2d 483, 488 (11th Cir. 1982). Thus, whether petitioner in fact coerced employees by means of the distribution of the T-shirts is not dispositive. The issue instead is whether the distribution of the T-shirts, under all the circumstances, had a reasonable tendency to restrain the employees respecting their choice of a collective-bargaining representative.

Applying its objective test to the facts of this case, the Board concluded that petitioner's "recording of names of those accepting the T-shirts reasonably tended to interfere with the employees' free choice of a collective-bargaining representative, and violated Section 8(a)(1) of the Act." Pet. App. 65-66. The record fully supports the Board's conclusion. Rather than "simply provid[ing] a supply of T-shirts at a central location, unaccompanied by any coercive conduct," petitioner required employees to refrain from displaying support for the union in order to receive "vote no" T-shirts. *Id.* at 64-65. Although several employees complained about this requirement, it

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[7] Section 7 of the Act, 29 U.S.C. 157, provides in pertinent part that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations."

was approved by Marvin Johnson, petitioner's president, who asserted that "the employees had to be one way or the other." *Id.* at 63-64. Moreover, petitioner required employees receiving a T-shirt to sign a list acknowledging receipt. *Id.* at 65. Maintenance of such a record, the Board explained, allows an employer "to discern the leanings of employees, and to direct pressure at particular employees in its campaign efforts." *Ibid.* Accordingly, "it would be reasonable for the employees to conclude that the recording of employees' names as they received the antiunion T-shirts was done for purposes other than merely monitoring supplies." *Ibid.*

Contrary to petitioner's contention, neither the Board nor the court of appeals found that the method of distributing the anti-union T-shirts violated Section 8(a)(1) merely because it afforded petitioner "an *opportunity* to pressure or coerce employees." Pet. 21-22. Recording the names of employees who took anti-union T-shirts, coupled with the denial of such T-shirts to employees displaying support for the union, was similar to polling or interrogating employees concerning their union sentiments. Even if petitioner took no action based on the information it obtained, its conduct had a similar tendency to intimidate or coerce the employees. See, *e.g.*, *W.A. Sheaffer Pen Co.* v. *NLRB*, 486 F.2d 180, 182 (8th Cir. 1973) (employer's distribution of a questionnaire violated Section 8(a)(1) in light of "its unmistakable potential for abuse of the employees' protected [Section] 7 rights"); *Midwest Regional Joint Board, Amalgamated Clothing Workers* v. *NLRB*, 564 F.2d 434, 445 (D.C. Cir. 1977) (polling violated Section 8(a)(1) where it "placed employees in jeopardy of unwittingly or unwillingly disclosing their [u]nion sympathy").

Nor is there merit to petitioner's assertion (Pet. 22) that its distribution of the "vote no" T-shirts was conduct privileged by Section 8(c) of the Act.[8] Section 8(c) permits an employer "to attempt by speech or otherwise to influence and persuade employees in their ultimate choice [of a collective-bargaining representative], so long as the persuasion is not violative of the express provisions of the Act." *Livingston Shirt Corp.*, 107 N.L.R.B. 400, 406 (1953). Although petitioner was entitled to "distribute 'vote-no' t-shirts to gain support for its side during the Union campaign and to 'combat' the 'vote-yes' t-shirts," Pet. App. 24, it was not permitted to employ a method of distribution that violated Section 8(a)(1).

Finally, petitioner contends (Pet. 26-29) that the Board improperly relied upon the standard applicable to election disputes in determining whether an unfair labor practice had been committed.[9] In particular, petitioner takes issue with the Board's reliance (see Pet. App. 65) on *Houston Chronicle Publishing Co.*, 293 N.L.R.B. 332 (1989).[10] There is no merit to this contention. Both the

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[8] See note 6, *supra*.

[9] Board precedent makes clear that the two inquiries are governed by different standards. "Conduct that creates an atmosphere which renders improbable a free choice will sometimes warrant invalidating an election, even though that conduct may not constitute an unfair labor practice." *General Shoe Corp.*, 77 N.L.R.B. 124, 126 (1948). For example, the Board will set aside the result of an election where either the employer or the union has delivered a "captive audience" speech to employees within 24 hours of the election, even though such conduct is not an unfair labor practice. See *Peerless Plywood Co.*, 107 N.L.R.B. 427 (1953).

[10] In *Houston Chronicle*, the Board sustained the union's objection to a decertification election and set aside the election result on the basis of the employer's conduct. See also *Gold Bond Building Products, Division of National Gypsum Co.*, 280 N.L.R.B. 1003 (1986), cited by the court of appeals (Pet. App. 24).

Board and the court of appeals applied to the facts surrounding petitioner's distribution of the "vote no" T-shirts the standard governing the inquiry whether an employer's conduct amounts to an unfair labor practice under Section 8(a)(1). Pet. App. 25, 64-66. Indeed, petitioner fails to note that the Board prefaced its citation to *Houston Chronicle* with the introductory signal "cf." (Pet. App. 65), and that the authority cited in direct support of its unfair labor practice finding (*id.* at 66) is *Lott's Electric Co.*, 293 N.L.R.B. 297, enforced, 891 F.2d 281, 282 (3d Cir. 1989) (Table). As petitioner acknowledges (Pet. 31), in *Lott's Electric* the Board found that the employer's distribution of "vote no" buttons during an election campaign amounted to coercive interrogation of employees concerning their union sentiments in violation of Section 8(a)(1). See 293 N.L.R.B. at 303-304.

2. "It is well established that an employer violates [S]ection 8(a)(1) of the Act if it threatens to close the plant or institute layoffs if its employees select union representation." *NLRB* v. *Nueva Engineering, Inc.*, 761 F.2d 961, 966 (4th Cir. 1985). Petitioner characterizes supervisor Gilchrist's statement to employees that "we might both be out of a job" in the event of a union victory as an expression of personal opinion protected by Section 8(c) of the Act. Pet. 33-38. The Board reasonably found, however, that Gilchrist's comments were "implicit threats that the plant would close if the employees selected the Union as their bargaining representative." Pet. App. 67. It noted that Gilchrist had initiated the conversations in which the remarks were made, that the conversations took place in work areas, and that Gilchrist did not qualify her remarks as being her personal opinion. *Id.* at 68-69. Under these circumstances, the Board reasonably concluded that "nothing occurred in these conversations to indicate to employees that

Gilchrist was speaking in other than her capacity as a supervisor for [petitioner]." *Id.* at 68.[11]

[11] Petitioner relies (Pet. 36-37) on *Standard Products Co.*, 281 N.L.R.B. 141 (1986), enforcement denied in part on other grounds, 824 F.2d 291 (4th Cir. 1987), in which the Board found that a supervisor's remark respecting plant closure in the event of a union victory did not violate Section 8(a)(1). That case is readily distinguishable. In *Standard Products*, an employee asked her supervisor "what she thought about a union." 281 N.L.R.B. at 151. The supervisor replied that, in her personal opinion, she was against the union because "she was afraid that if the [u]nion came in, the plant would close down, and she needed her job." *Ibid.* That "casual conversation" occurred nearly one year before the election. *Id.* at 145, 151. Here, by contrast, Gilchrist's remark was made in conversations with eight to ten different employees on the day before the election; it was Gilchrist, not the employees, who initiated the conversations; and Gilchrist did not give any indication that she was expressing a purely personal opinion. Pet. App. 28, 29-30, 68. See generally *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 616-620 (1969).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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